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(1)

No. _____

Supreme Court, U.S.
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In The

Supreme Court of the United States

October Term, 1990

JAMES WOODARD,

Petitioner,

vs.

STATE OF VERMONT AND WILLIAM H. CONWAY, JR., VERMONT COMMISSIONER OF MOTOR VEHICLES,

Respondent.

Petition For A Writ Of Certiorari To The Supreme Court Of The State Of Vermont

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED

The State of Vermont charges its residents a four percent purchase and use tax on their cars, without granting a credit to all Vermonters for sales taxes paid elsewhere. 32 V.S.A. §8911(9). However, by agency rule adopted in July of 1985, the Department of Motor Vehicles ceased giving the credit to some Vermonters; specifically those who not only purchased but who also registered their new cars in the state of purchase. In February 1985, Petitioner James Woodard, a lifelong Vermonter, purchased and registered a new car in the State of Florida. When he attempted to register the car in Vermont, he was denied a credit pursuant to 32 V.S.A. §9811(9). Petitioner subsequently filed suit alleging violation of the Equal Protection Clause and the Due Process Clause. The Vermont supreme court dismissed the action for failure to state a claim on November 9, 1990. It held that petitioner should have filed a tax refund claim before the Vermont motor vehicle department rather than bring an original action for deprivation of constitutional rights in Vermont's trial court.

The following questions are presented:

1. Whether the Vermont state courts are required to hear petitioner's constitutional tax challenge under 42 U.S.C. §1983 or the Fourteenth Amendment?

2. Whether Vermont may require petitioners to litigate the constitutionality of a state tax before a state

QUESTIONS PRESENTED – Continued

administrative agency, where no right to a hearing or procedural safeguards is guaranteed and where judicial review is discretionary?[1]

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[1] Many of the questions presented and issues raised in this Petition are identical to those raised in *Williams and Levine v. State of Vermont*, a case also before this Court on a Petition for Writ of Certiorari. Much of the discussion of the issues in this Petition is identical to that in the *William's* Petition.

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PETITION FOR A WRIT OF CERTIORARI TO THE VERMONT SUPREME COURT

Petitioner James Woodard respectfully petitions for a Writ of Certiorari to review the judgment of the Vermont Supreme Court in this Case.

OPINION BELOW

The Opinion of the Vermont Supreme Court (App. 3-28, infra) is reported at 15___ Vt. ___, 2 Vt. L.W. 47 (1991).

JURISDICTION

The judgment of the Vermont Supreme Court was entered on November 9, 1990. A timely petition for reargument was denied on February 1, 1991 (App. 1), but the court revised part of its decision by deleting all references to exhaustion of remedies and issued a new opinion on that day (App. 3-28). On May 2, 1991, Justice Marshall issued an order extending the time for filing a petition for writ of certiorari to and including June 15, 1991. The jurisdiction of this Court is invoked under 28 U.S.C. §1257(a).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

1. Amendment XIV, §1, cl. 4, United States Constitution:

   No state shall . . . deny to any person within its jurisdiction the equal protection of the laws.

2. Amendment XIV, §1, Cl. 4, United States Constitution:

   No state shall . . . deprive any person of life, liberty or property, without due process of law . . . .

3. Vermont Statutes Annotated, T. 32, §8911: [The test of this statute is reprinted at App. 30-31 of the Appendix].

STATEMENT OF THE CASE

1. Procedural Background.

Petitioner in this case seeks a tax credit to which he is entitled pursuant to 32 V.S.A. §8911(9) for the sales tax he paid in Florida on the purchase of a new car which he then drove home to Vermont, his state of residence. As well, Petitioner seeks a declaratory judgment that the manner in which the Department of Motor Vehicles (hereinafter "DMV") administers the tax-credit scheme under §8911(9) is unconstitutional.

Like many Vermonters, Petitioner purchased a motor vehicle outside the State of Vermont and then returned to Vermont shortly thereafter to register his car in his home state. Petitioner believed he would be entitled to a tax credit for the sales tax he already paid to the reciprocal

state where he purchased the car. He later found out that, because he had registered the car in Florida, he was no longer entitled to the tax credit to which he would have been entitled had he simply driven the car home unregistered. *See Agency of Transportation, Department of Motor Vehicles*, Rule 86-28-E (July 1, 1986). (App. 29.)

In early 1986, Petitioner filed a complaint in Washington County Superior Court seeking declaratory relief. Petitioner sought a declaratory order from the court that the DMV's practice of denying Vermont residents a tax credit under §8911(9) is void and unconstitutional, insofar as the practice imposes a registration fee and license suspension penalty on Petitioner by reason of his status as a Vermont resident who registered his car in a reciprocal state, a penalty and tax which would not be imposed on any Vermont resident who purchased a car under the same circumstances but who did not register that car in the reciprocal State. Petitioner's complaint also sought an order from the Superior Court to refund the purchase and use tax which was denied him when he registered his new car in Vermont. Finally, Petitioner's complaint sought an order awarding him costs and reasonable attorney's fees as authorized by 42 U.S.C. §1988.

Shortly after filing the complaint, this case was designated a complex action and was consolidated with *Williams v. State of Vermont*, Docket No. S436-82WnC. At about the same time, Respondent filed a Motion to Dismiss. That motion was later supplemented and Petitioner filed a response in due course.

After the filing of Appellee's Motion to Dismiss, this case took a remarkably complicated procedural path to its present position. Respondent's Motion was eventually denied. Petitioner then filed a Motion for Summary Judgment which the Court later summarily granted and then, at Respondent's urging, withdrew the order granting Petitioner's motion. Subsequently, upon Respondent's motion to reconsider, the Court entered an opinion and Order, filed on November 2, 1988, dismissing this case.

The case was appealed to the Vermont Supreme Court. That Court handed down an opinion which affirmed the Superior Court but on entirely new grounds. It held that Petitioner was not entitled to relief because §1983 actions for monetary relief cannot be sustained in state court and because Petitioner failed to seek administrative review before filing his original action in Superior Court.

2. Factual Background.

Petitioner, James L. Woodard, is and always has been, a Vermont resident. Petitioner qualifies as a Vermont resident for purposes of determining the availability of the tax credit. 32 V.S.A. §8902(2) and 23 V.S.A. §4(30). Petitioner has continuously held a Vermont driver's license, and none other.

In February, 1985, Mr. Woodard purchased a new Chevrolet automobile from Bruce King Chevrolet, Inc. in Lakeworth, Florida. He paid $14,550.00 for his new automobile plus 7% Florida sales tax of $735.00. Petitioner Woodard also registered his car in Florida.

After purchasing the vehicle, Petitioner Woodard and his wife drove from Florida to their home in Vermont. Approximately 1 1/2 weeks passed from the date of purchase to the date of the Woodards' arrival back in Vermont. The Woodards had taken a scenic route from Florida to Vermont as part of their vacation.

As a resident of Vermont, Petitioner Woodard was required to register his new car with DMV pursuant to 23 V.S.A. §301. During the summer months of 1985, Mr. Woodard attempted to register his new vehicle with the Vermont Department of Motor Vehicles. At that time, he was informed that he would have to pay a purchase and use tax of 4% on the value of his new automobile. The tax assessed was $588.00, representing 4% of the total new value of Mr. Woodard's automobile of $14,550.00, despite the fact that he had paid a 7% tax in a reciprocal state (Florida).

Mr. Woodard paid the Vermont tax under protest. After repeated contact with the Governor's office and the Department of Motor Vehicles, Mr. Woodard was informed by commissioner William H. Conway on August 26, 1985 that the Vermont tax was properly imposed on his automobile.

Under 32 V.S.A. §8911(9) a Vermont resident is exempted from payment of the purchase use tax when he registers his car in Vermont after having purchased it in an outside state and after having paid a sales or use tax in that state, so long as the state or province collecting such a tax would grant the same pro rata credit for a Vermont tax paid under similar circumstances in this state. The state of Florida, in which Petitioner acquired his car,

grants such a pro rata credit for Vermont taxes and thus qualifies as a reciprocal state under §8911(9). *See* 10A V.S.A. §2061. Thirty-five of the fifty states grant such a credit.

In July of 1985, DMV filed a proposed rule pursuant to the Vermont Administrative Procedure Act. This proposed rule did not become an actual regulation of the Department until a year later, in July of 1986. In the proposed rule application, DMV indicated that "this rule reflects the existing practice of the Department."

This case is similar to its companion case, *Williams v. State of Vermont*. That case, too, has travelled a remarkably complex procedural path. A significant turn in that path came in June of 1985, when this Court ruled that the Plaintiffs, there, had made out a *prima facia* case for their claim that Vermont's Motor Vehicle Purchase and Use Tax was unconstitutional in that it violated the equal protection clause of the United States Constitution. The Plaintiffs in the *Williams* case are out-of-staters who bought, registered and paid sales taxes on motor vehicles in other states. Those individuals then moved to Vermont and were forced to pay a use tax on the same motor vehicle. The *Williams* Plaintiffs claim that Vermont's purchase and use taxing scheme is unconstitutional in that it creates two separate classes of taxpayers – individuals who move to Vermont and seek to register their motor vehicles here and individuals who are Vermonters but purchase their cars in other states and then register their cars here. The latter class are granted a tax credit against the sales or use tax paid in the outside state, whereas the former class of individuals are not permitted a similar credit. The *Williams* Plaintiffs claim that this discrimination between

classes of individuals is unconstitutional because there is no rational basis for the distinction between them. This Court agreed and remanded the case for a factual determination as to whether the statute was, though facially unconstitutional, saved by a constitutional administration.

Shortly after remand, in July of 1985, as mentioned above, DMV attempted to cure the unconstitutional nature of the statute by limiting the tax credit provided to Vermonters. Although in its proposed rule, DMV stated that its object was merely to codify existing practice, what limited discovery has been permitted to occur suggests that practice was, at a minimum, inconsistent and some Vermonters who purchased and registered cars in reciprocal states were afforded a tax credit upon registration in Vermont. At any rate, the rule states that Vermonters who buy and register their cars in reciprocal states will not be entitled to the tax credit. Only those Vermonters who buy their cars and other states but do not register them in that state are entitled to a tax credit in Vermont. Thus, the Department of Motor Vehicles attempted to eliminate the discrimination between out-of-staters who purchase, pay a tax on, and register their cars out of state and Vermonters who do exactly the same by denying those Vermonters the §8911(9) credit.

In so doing, however, DMV created a new type of discrimination. The statute discriminates between Vermonters who purchase, pay a tax on, and register their cars out of state and those who simply purchase, pay a sales tax on, but do not register their cars out of state. The only basis for this new discrimination was an attempt on

the Department's part to eliminate the type of discrimination that existed in the *Williams* case. Clearly, this basis for the discrimination between Vermonters cannot withstand constitutional scrutiny.

3. The Vermont Supreme Court Opinion.

In an opinion dated November 9, 1990, and reissued with modifications on February 1, 1990, the Vermont Supreme Court ruled *sua-sponte* that exhaustion of administrative remedies was a necessary prerequisite to suit. (App. 3-28). In fact, it affirmed the dismissal and held that this was the sole recourse available to Petitioner. *Id.* The court also ruled that Petitioner's tax refund claim failed to state a cause of action under §1983, because a state or state official acting in his official capacity is not a "person" within the meaning of that section when monetary relief is sought.[2] It also rejected petitioners' claim for a refund directly under the 14th Amendment, distinguishing four decisions of this Court providing such relief. (App. 7). It concluded: "none of these cases expressly provide a right of action directly under the Constitution" and "all these cases long predate the development of modern §1983 law." (App. 12, n.7).

The supreme court did acknowledge that Vermont was constitutionally required to provide a remedy for

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[2] The court assumed that Respondent Conway was being sued only in his official capacity, although the complaint does not so state. As in federal practice, Rule 12, V.R.Civ.P., requires all doubts raised by the pleadings to be construed against the moving party.

unlawful taxes under *McKesson Corp. v. Division of Alcoholic Beverages and Tobacco*, 110 S. Ct. 2238 (1990). In so ruling, it reversed the superior court and its own prior decision in *American Trucking Assns. v. Conway*, 146 Vt. 579, 508 A.2d 408 (1986), which held that the state could refuse to refund unconstitutional taxes on sovereign immunity grounds. (App. 20). However, it concluded that an administrative hearing before the motor vehicle department was all that *McKesson* required. *Id.*

Finally, the Vermont supreme court held that petitioner was not entitled to declaratory relief under §1983. First, it said, the Vermont Declaratory Judgment Act does not expand the court's jurisdiction beyond what is already authorized by the legislature. Here, the legislature has restricted tax refund claims to the motor vehicle department. (App. 21-28). Severed from the refund claim, the court continued, the petitioners' request for declaratory relief does not provide a justiciable controversy, since petitioner is unlikely to be denied a tax credit again. *Id.*

Petitioner filed a timely motion for reargument on November 26, 1990. Among other things, he asserted that the administrative exhaustion requirement imposed by the court conflicts with *Felder v. Casey*, 487 U.S. 131 (1988). Without agreeing that constitutional tax refund actions are foreclosed under §1983 or the 14th Amendment, petitioner also argued that declaratory actions are available even where tax refunds are not. Finally, petitioner suggested that if the court wants the motor vehicle department to make a factual determination, it should remand the action there rather than dismissing it outright. At least, petitioner concluded, the court should clarify what

statute of limitations applies with respect to refund claims filed with the department.

On February 1, 1991, the Vermont supreme court denied petitioner's motion for reargument in all respects. (App. 1) It declined to remand the action to the motor vehicle department or to clarify what statute of limitations applied. However, the court did "delete[ ] certain references in the opinion to exhaustion of remedies; that doctrine plays no role in our decision." *Id.*[3]

REASONS FOR GRANTING CERTIORARI

Review is essential to ensure that this Court's decision in the *Williams* case is given proper effect and to resolve fundamental constitutional issues raised by the Vermont supreme court's second dismissal. With respect to the first question, the Vermont courts have failed to require a factual determination as to whether, in practice, the Vermont purchase and use tax credit is administered in a fashion that satisfies the Equal Protection Clause. Rather than determining the constitutionality of the states practice, the state supreme court dismissed the case on the pleadings, on grounds which the respondents either did not think of or chose not to assert to this Court or any other during the first three years of litigation. Such a result frustrates judicial economy, prejudices the petitioner, and conflicts with the mandate rule established by this Court.

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[3] In fact, the court eliminated the final two pages of its initial slip opinion entirely.

In dismissing, the Vermont supreme court also raised issues of constitutional and federal law which go well beyond the state tax statute at issue. The first is whether actions for declaratory relief or tax refunds are available in state court under §1983 or the 14th Amendment at all. This Court has twice reserved the question of whether §1983 jurisdiction is mandatory in state court, and state courts considering constitutional tax challenges are divided on the point. The Vermont supreme court interpreted *Will v. Michigan Dept. of State Police*, 109 S. Ct. 2304 (1989), to preclude tax refund actions under §1983, even though *Will* involved legal damages rather than a tax refund. It also held that petitioner's declaratory relief claim was moot, despite rulings by this Court that constitutional tax challenges cannot be rendered moot by changes in tax laws or by the unavailability of a refund. *See, e.g., Texas Monthly, Inc. v. Bullock*, 109 S. Ct. 890 (1989); *Montana National Bank of Billings v. Yellowstone County of Montana*, 276 U.S. 499 (1928). Finally, the Vermont supreme court rejected a number of decisions of this Court, suggesting that relief is available directly under the 14th Amendment.

Even if a judicial cause of action is not available under §1983 or the Fourteenth Amendment, however, the administrative remedy to which petitioner has been relegated fails to satisfy minimum due process requirements. That administrative remedy allows Respondent Conway to make the decision of whether to hold a hearing and, if he does, whether to permit discovery or enforce any evidentiary or procedural rules. Judicial review of Respondent Conway's decision is left to the discretion of the courts.

This Court has established in *Mathews v. Eldridge*, 424 U.S. 319 (1976), and subsequent cases that one may not be deprived of property without fair procedures and a meaningful hearing. Only last year, this Court reaffirmed that this rule applies to state taxes. *McKesson Corp. v. Division of Alcoholic Beverages and Tobacco*, 110 L. Ed. 2d 17, 35-36 (1990). Further, in cases like the instant one which involve not just the deprivation of property but the deprivation of constitutional rights, this Court has held that a judicial determination of facts and law is required *Ohio Valley Water Co. v. Ben Avon Borough*, 253 U.S. 287 (1920).

I. THIS COURT SHOULD ACCEPT REVIEW TO DETERMINE WHETHER STATE COURT TAX CHALLENGES ARE AVAILABLE UNDER §1983 OR THE FOURTEENTH AMENDMENT.

The Vermont supreme court's decision raises considerable concerns under the Constitution and federal law. The first is whether state courts must recognize a judicial cause of action for constitutional tax challenges under 42 U.S.C. §1983 or the Fourteenth Amendment. This issue assumes unique importance in the state tax context, since the Tax Injunction Act of 1937 and Eleventh Amendment severely limit federal court jurisdiction and remedies.[4]

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[4] Federal courts are precluded from hearing almost all challenges to state and local taxations by the Tax Injunction Act, 28 U.S.C. §1341 (1982). *See* E. Chemerinsky, *Federal Jurisdiction* §11.3, at 570-76 (1989). This Court has made clear that the act limits not only injunctive relief but also declaratory

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Review is essential to resolve a deep split in the state courts on this issue and to correct substantial errors in the decision below.

The Vermont supreme court remitted petitioner to the state motor vehicle department because, it held, they had failed to state a cause of action for judicial relief under either 42 U.S.C. §1983 or the Fourteenth Amendment. Vermont thus became one of at least nine states refusing to recognize a judicial action for constitutional tax challenges.[5] On the other hand, courts in four states, including two state supreme courts, have concluded that they are obligated to hear such claims, while at least seven

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judgments and damages. *California v. Grace Brethren Church*, 457 U.S. 393, 411 (1982); *Fair Assessment in Real Estate Association v. McNary*, 454 U.S. 100, 113 (1981). It also has established that the Eleventh Amendment prohibits tax refunds in federal court, absent the state's consent. *Ford Motor Co. v. Dept. of Treasury*, 323 U.S. 459 (1945).

[5] In six of the other eight states, the decision was handed down by the highest court of the state. The cases are *Zizka v. Water Pollution Control Authority*, 195 Conn. 682, 490 A.2d 509 (1985); *Backus v. Chilivis*, 236 Ga. 500, 224 S.E.2d 370 (1976); *Vann v. DeKalb County Board of Tax Assessors*, 186 Ga. App. 208, 367 S.E.2d 43 (1988) (following *Backus*); *Stufflebaum v. Panethiere*, 691 S.W.2d 271 (Mo. 1985) (*en banc*); *Strain v. Baryla*, No. TSB-H-84(44)S (N.Y. St. Tax Comm'n June 1, 1984) (LEXIS, States library, Alltax file); *Johnston v. Gaston County*, 71 N.C. App. 707, 323 S.E.2d 381 (1984); *Linderkamp v. Bismarck School Dist. No. 1*, 397 N.W.2d 76 (N.D. 1986); *Spencer v. South Carolina Tax Commission*, 281 S.C. 492, 316 S.E.2d 386 (1984); *aff'd by an equally divided court*, 471 U.S. 82 (1985); *Davis v. City of Elkhorn*, 132 Wis. 2d 394, 393 N.W.2d 95 (1986).

others have assumed jurisdiction without discussion.[6] This Court has stated that "[w]hether state courts must assume jurisdiction over [§1983 suits challenging state taxation] is not entirely clear," *Arkansas Writers' Project, Inc. v. Ragland*, 481 U.S. 221, 234 n.7 (1987), and it has twice left open the question of whether state court must hear §1983 actions at all. *Maine v. Thiboutot*, 448 U.S. 1, 3 n.1 (1980); *Martinez v. California*, 444 U.S. 277, 283 n.7 (1980). In *Spencer v. South Carolina Tax Commission*, 471 U.S. 82 (1985), an equally divided court affirmed without opinion a state case refusing to exercise jurisdiction over a §1983 tax claim. Commentators have favored mandatory state court jurisdiction for constitutional tax claims. *See, e.g.*, Taylor, "§1983 in State Court: A Remedy

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[6] Courts holding that jurisdiction is mandatory include *Beverly Bank v. Board of Review*, 117 Ill. App. 3d 656, 453 N.E.2d 96 (1983), *cert. denied*, 466 U.S. 951 (1984); *Allison v. Board of County Comm'rs*, 241 Kan. 266, 737 P.2d 6 (1987); *Burrell v. Mississippi State Tax Commission*, 536 So. 2d 848 (Miss. 1988) (*en banc*); *Bung's Bar & Grille, Inc. v. Township Council*, 206 N.J. Super. 432, 502 A.2d 1198 (Law Div. 1985).

State courts which have entertained §1983 tax actions without discussing jurisdiction include *Town of Eclectic v. Mays*, 547 So. 2d 96 (Ala. 1989); *Arkansas Writers' Project, Inc. v. Ragland*, 293 Ark. 395, 738 S.W.2d 402 (1987); *Satellink of Chicago, Inc. v. City of Chicago*, 168 Ill. App. 3d 689, 523 N.E.2d 13 (1988); *Uretsky v. Baschen*, 47 Ill. App. 3d 169, 361 N.E.2d 875 (1977); *Dutoit v. Board of County Comm'rs*, 233 Kan. 995, 667 P.2d 879 (1983); *Porter v. Treasurer & Collector of Taxes*, 385 Mass. 335, 431 N.E.2d 934 (1982); *Department of Treasury v. Campbell*, 161 Mich. App. 526, 411 N.W.2d 722 (1987); *423 South Salina St. v. City of Syracuse*, 68 N.Y.2d 474, 503 N.E.2d 63, 510 N.Y.S.2d 507 (1986), *cert. denied*, 481 U.S. 1008 (1987); *Holden Arboretum v. City of Kirtland*, 19 Ohio App. 3d 125, 483 N.E.2d 167 (1984); *Brower v. Wells*, 103 Wash. 2d 96, 690 P.2d 1144 (1984) (*en banc*).

for Unconstitutional State Taxation," 95 Yale L. J. 414 (1985); Note, "Clarifying Comity: State Court Jurisdiction and §1983 State Tax Challenges," 103 Harv. L. Rev. 1888 (1990).

In refusing jurisdiction under the Fourteenth Amendment, the Vermont supreme court rejected multiple decisions of this Court suggesting that tax refund actions are available directly thereunder. *See Jackson County v. United States*, 308 U.S. 343, 350-51 (1939); *Iowa-Des Moines National Bank v. Bennett*, 284 U.S. 239, 246-47 (1931); *Brinkerhoff-Faris Trust & Savings Co. v. Hill*, 281 U.S. 673, 679 (1930); *District of Columbia v. Thompson*, 281 U.S. 25, 31-33 (1930); *Carpenter v. Shaw*, 280 U.S. 363 (1930); *Montana National Bank v. Yellowstone County*, 276 U.S. 499, 504-05 (1928); *Ward v. Love County*, 253 U.S. 17 (1920); *Gaar, Scott & Co. v. Shannon*, 223 U.S. 468 (1912); and *Atchison, Topeka & Santa Fe Railway v. O'Connor*, 223 U.S. 280 (1912). Although this Court has emphasized that a judicial remedy is the rule when constitutional rights are violated, *Carlson v. Green*, 446 U.S. 14, 26 (1980) (Powell, J. concurring), and despite the fact that this Court recognized the continuing vitality of *Iowa-Des Moines National Bank* just two years ago in *Davis v. Michigan Department of Treasury*, 109 S. Ct. 1500, 1508-09 (1989), the Vermont supreme court concluded that *Ward* and similar cases were irrelevant in the face of modern §1983 law and that the Fourteenth Amendment could not overcome state sovereign immunity. (App. 10, n.7)

Finally, the Vermont supreme court held that no §1983 action for a tax refund was available because Respondent Conway was not a "person" within the

meaning of the statute. The court relied on *Will v. Michigan Department of State Police*, 109 S. Ct. 2304 (1989) for its conclusion, but the reasoning there does not support such a result. In *Will*, this Court held that a state employee, acting in his official capacity, could not be sued for *damages* under §1983 in connection with a claim of illegal employment practices. *Id.* at 2307-08. The Court reasoned that Congress had not intended to disturb traditional notions of state sovereign immunity when it enacted §1983. *Id.* at 2309. Crucially, however, such notions of sovereign immunity did not extend to actions for equitable relief – including actions for tax refunds. That point is made clear by the cases relied on in footnote 10 of the *Will* opinion, many of which required state officials to return unconstitutional taxes and other property obtained in tax seizures, 109 S. Ct. 2311-12, n.10. It is explained in detail in Justice Stevens' dissent. 109 S. Ct. at 2323.[7] The Vermont supreme court's decision does not abide by established principles of state sovereign immunity; it expands them. That result is contrary to the "unique federal remedy" §1983 provides. *Mitchum v. Foster*, 407 U.S. 225, 239 (1972).

In sum, the Vermont supreme court's decision not to recognize petitioner's tax challenge under either the Fourteenth Amendment or §1983 points up a deep and

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[7] Other members of this Court also have recognized the "broad and well-established power of courts to provide equitable relief for constitutional wrongs," as opposed to the narrower and more recent recognition of damage actions under the Constitution. *See Carlson v. Green*, 446 U.S. 14, 42-43 (1980) (Rehnquist, J., dissenting).

unresolved split among the state courts and raises important questions of constitutional and federal law. The lower court has called into question precedents of this Court holding that refund actions are available under the Fourteenth Amendment; it has ignored others in denying a right to declaratory relief; and it has extended *Will* beyond its logical bounds in denying a §1983 refund action. This Court should accept review to insure that constitutional tax claims are treated properly and uniformly, regardless of which state court they happen to be filed in.

II. THE ADMINISTRATIVE REMEDY CONJURED UP BY THE VERMONT SUPREME COURT FAILS TO SATISFY MINIMUM FEDERAL DUE PROCESS REQUIREMENTS.

Even if state courts were not required to hear constitutional tax challenges under §1983 or the Fourteenth Amendment, state law remedies still would need to satisfy basic due process requirements. *McKesson Corp. v. Division of Alcoholic Beverages and Tobacco*, 110 L.Ed.2d 17, 35-36 (1990). The remedy left to petitioner by the Vermont supreme court, a second tax refund request under Vt. Stat. Ann. title 32, §8912, falls well short of the mark. It includes neither the right to a hearing, necessary procedural guarantees, nor mandatory judicial review. The decisions of this Court suggest emphatically that such a remedy is constitutionally insufficient.

Section 8914 of title 32, Vt. Stat. Ann., sets forth the sole remedy for taxpayers challenging motor vehicle tax assessments. It provides: "Any overpayment of such tax as determined by the commissioner shall be refunded."

Under the state motor vehicle statutes, the decision of whether to conduct a hearing at all is left to the Commissioner, as is the question of what discovery shall be permitted and what procedures observed. Motor vehicle department proceedings are specifically exempted from coverage by the Vermont administrative procedure act, which otherwise requires procedural guarantees in agency cases. *See* Vt. Stat. Ann. tit. 3, §816(b).[8] No motor vehicle department hearing procedures have been published. *See* 6 Code of Vermont Rules, Motor Vehicle Department pp. 14050001 *et seq.* (Weil 1989).

Besides the lack of procedural safeguards, no established right of judicial review exists from tax refund denials under §8914. The Vermont supreme court has refused to imply a right of judicial review from agency proceedings where, as here, the governing statute does not specifically require a hearing. *Reed v. Department of Public Safety*, 137 Vt. 9, 398 A.2d 301 (1979); *Fitzpatrick v. Vermont State Retirement System*, 136 Vt. 510, 394 A.2d 1138 (1978). While the court has suggested that review may be available in such cases by certiorari, *Campbell v. Manchester Board of School Directors*, 152 Vt. 643, 565 A.2d 1318 (1989) (mem.), such review is left to the discretion of the reviewing court. *Lewis v. Holden*, 118 Vt. 59, 99 A.2d 758 (1953).

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[8] The wide discretion permitted the Commissioner is conspicuous in the context of other Vermont tax statutes. Both the Vermont income tax and the general sales and use tax statutes contain very precise procedures and provisions for judicial review, for example. *Cf.* Vt. Stat. Ann. tit. 32, §§5881-5895 (income tax); §§9811-9818 (general sales and use tax).

This Court has long insisted that state tax remedies must comport with the Due Process Clause, *Central Georgia Railway Co. v. Wright*, 207 U.S. 134 (1907), and recently has reiterated the point. *McKesson*, 110 L.Ed.2d at 35-36. Under the due process test developed in *Mathews v. Eldridge*, 424 U.S. 319 (1976) and subsequent cases, the right to some form of hearing is a minimum requirement where an individual is deprived of life, liberty or property. This Court also has mandated judicial review where agency fact-finding methods are inadequate. *Citizens to Preserve Overton Park v. Volpe*, 401 U.S. 402, 415 (1971) (under Administrative Procedure Act).

The allegation here is not merely deprivation of property, moreover, but the deprivation of constitutional rights. Petitioner contends that he was forced to pay additional taxes in violation of this constitutional right to equal protection.[9] Where such "constitutional facts" are at issue, the Due Process Clause requires not merely an administrative hearing but a *judicial* determination of the facts and law. *See Ohio Valley Water Co. v. Ben Avon Borough*, 253 U.S. 287 (1920) (eminent domain); *see also St. Joseph Stock Yards Co. v. United States*, 298 U.S. 38, 51-52 (1936). This principle, too, has lately been reaffirmed. *See Connick v. Myers*, 461 U.S. 138, 148-150 & n.10 (1983) (collecting cases) *See also* Note, "De Novo Judicial Review

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[9] Accordingly, this case must be contrasted with such due process decisions as *Parratt v. Taylor*, 451 U.S. 527 (1981), which involve the deprivation of property only. *Parratt* would be analogous if the warden there had confiscated the prisoner's property because he exercised First Amendment rights or because the prisoner was black, or for some other reason forbidden by the Constitution.

of Administrative Agency Factual Determinations Implicating Constitutional Rights," 88 Columbia L. Rev. 1483 (1988); Strong, "The Persistent Doctrine of Constitutional Fact," 46 N.C.L. Rev. 223 (1968). As this Court has emphasized: "Constitutional questions obviously are unsuited to resolution in administrative hearing procedures and, therefore, access to the courts is essential to the decision of such questions." *Califano v. Sanders*, 430 U.S. 99, 109 (1977). *See also Burnett v. Grattan*, 462 U.S. 42, 50 (1984) ("the dominant characteristic of civil rights actions: they belong in court.").

The Vermont supreme court's ruling that petitioner's sole remedy on remand was to request a refund again from Respondent Conway under §8914 cannot be squared with basic due process demands. Nothing compels Respondent Conway to provide a hearing or any procedural safeguards attendant thereto; and nothing compels the Vermont courts to provide judicial review. This Court should accept review to insure that petitioner is not deprived of his rights under the Equal Protection Clause through a deprivation of his due process guarantees.

CONCLUSION

For the above reasons, this Court should accept Petitioner's Petition and review the important but unsettled issues it raises.

Dated at Burlington, County of Chittenden, State of Vermont, this 10th day of June, 1991.

Respectfully submitted,

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Attorney for Petitioner

ENTRY ORDER

SUPREME COURT DOCKET NOS. 88-309 and 89-042

MARCH TERM, 1990

Norman Williams and Susan Levine	)	APPEALED FROM:
v.	)	Washington Superior Court
State of Vermont and William H. Conway, Jr., Vermont Commissioner of Motor Vehicles	)	DOCKET NOS. S436-82Wnc S56-86WnC
Valerie M. Quinn and James Woodard	)	(Filed Feb 01, 1991)
v.	)	
State of Vermont and William H. Conway, Jr., Vermont Commissioner of Motor Vehicles	)	

In the above entitled cause the Clerk will enter:

Appellants' motion for reargument is denied. We have deleted certain references in the opinion to exhaustion of remedies; that doctrine plays no role in our decision. We decline to remand the case to an agency from which it never originated. We decline to discuss statute of limitation issues which were never briefed or argued and express no view thereon.

Motion for reargument is denied.

BY THE COURT:

/s/ Frederic W. Allen
Frederic W. Allen, Chief Justice

/s/ Ernest W. Gibson III
Ernest W. Gibson III,
Associate Justice

/s/ Joseph J. Wolchik
Joseph J. Wolchik, District Judge
Specially Assigned

/s/ Matthew I. Katz
Matthew I. Katz, Superior Judge
Specially Assigned

/s/ Shireen Avis Fisher
Shireen Avis Fisher, District Judge
Specially Assigned

[ ] Publish

[ ] Do Not Publish

NOTICE: This opinion is subject to motions for reargument under V.R.A.P. 40 as well as formal revision before publication in the Vermont Reports. Readers are requested to notify the Reporter of Decisions, Vermont Supreme Court, 111 State Street, Montpelier, Vermont 05602 of any errors in order that corrections may be made before this opinion goes to press.

Nos. 88-309 and 89-042

Norman Williams and Susan Levine

v.

State of Vermont and William H. Conway, Jr., Vermont Commissioner of Motor Vehicles

Valerie M. Quinn and James Woodard

v.

Supreme Court

On Appeal from Washington Superior Court

March Term, 1990

State of Vermont and
William H. Conway, Jr.,
Vermont Commissioner of
Motor Vehicles

Alden T. Bryan, J.

O'Neill and Crawford and Norman Williams, pro se, Burlington, for plaintiffs-appellants Williams and Levine

Mary P. Kehoe of Gear and Davis, Inc., Burlington, for plaintiff-appellant Woodard

Jeffrey L. Amestoy, Attorney General, and Thomas R. Viall and Andrew M. Eschen, Assistant Attorneys General, Montpelier, for defendants-appellees

PRESENT: Allen, C.J. and Gibson, J., and Wolchik, D.J., Katz, Supr. J., and Fisher, D.J., Specially Assigned

KATZ, Supr. J., Specially Assigned. Plaintiffs filed suit in Washington Superior Court to secure refunds of taxes paid to the Department of Motor Vehicles upon first registering automobiles in Vermont. The superior court dismissed plaintiffs' claims. We affirm.

I. Record

In 1980, Norman Williams purchased and registered a Volkswagen Dasher in Illinois, his state of residency at the time, and paid the five percent Illinois sales tax. In 1981, he moved to Vermont with his car. When he subsequently applied to register the vehicle with the Vermont Department of Motor Vehicles, he was required to pay Vermont's four percent use tax pursuant to 32 V.S.A. § 8903(b). Believing the tax was unconstitutional, as it did not apply to *Vermont* residents who purchased and paid a

sales tax on vehicles in reciprocating states (including Illinois), see § 8911(9),[1] Williams brought suit in federal court under 42 U.S.C. § 1983 to enjoin enforcement. That suit was dismissed on the authority of the Tax Injunction Act, 28 U.S.C. § 1341. Williams then paid the tax and initiated an administrative proceeding, pursuant to 32 V.S.A. § 8914, for a refund. The Motor Vehicles Department felt constrained to assume the constitutionality of the tax scheme and denied relief.

Williams then filed the present action in superior court, serving the State and Commissioner Conway, pursuant to V.R.C.P. 4(d)(2), by serving the Attorney General. Susan Levine joined the action in an amended complaint. Levine, like Williams, had moved to Vermont from another state, bringing her car with her. She had purchased a Chrysler Horizon in New York and paid the seven percent New York sales tax. When she registered

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[1] Section 8911(9) provides:

> The tax imposed by this chapter shall not apply to:
>
> . . .
>
> (9) pleasure cars acquired outside the state by a resident of Vermont on which a state sales or use tax has been paid by the person applying for a registration in Vermont, providing that the state or province collecting such tax would grant the same pro-rata credit for Vermont tax paid under similar circumstances. If the tax paid in another state is less than the Vermont tax the tax due shall be the difference.

the car in Vermont, she was required to pay the state use tax.

In their complaint, Williams and Levine requested refunds of the respective use taxes as well as a declaratory judgment that the tax scheme violates several provisions of the United States Constitution: article I, section 8, clause 3 (Commerce Clause); article IV, section 2 (Privileges and Immunities); and the Fourteenth Amendment (Equal Protection and Privileges and Immunities Clauses). Although now in state court, the complaint rests on the federal cause of action provided by 42 U.S.C. § 1983.

The State filed a motion to dismiss, asserting the constitutionality of the statute. The motion was granted and Williams and Levine appealed to this Court, which affirmed on the strength of our opinion in *Leverson v. Conway*, 144 Vt. 523, 481 A.2d 1029 (1984). The United States Supreme Court then granted certiorari, reversed our decision, declared the statute invalid under the Equal Protection Clause of the Fourteenth Amendment, as it purported to afford unequal treatment to state residents and nonresidents without sufficient justification, and remanded for further proceedings. *Williams v. Vermont*, 472 U.S. 14 (1985). We, of course, remanded to the superior court. There, the State filed an answer raising, among other defenses, sovereign immunity.

In 1985, while a Vermont resident, James Woodard purchased and registered a vehicle in Florida, paying that state's seven percent sales tax. Upon transferring the registration to Vermont, he was told he had to pay

Vermont's use tax. He brought suit in superior court[2] seeking a refund and a declaration that the Department of Motor Vehicles' practice[3] of not affording a tax credit to Vermont residents in his situation – that is, having registered a vehicle out of state prior to returning to Vermont – is both contrary to the statutory scheme and in violation of several provisions of the Vermont Constitution as well as the Fourteenth Amendment to the United States Constitution.

None of the plaintiffs specify any relief against Conway personally. Nor are any allegations made to suggest any conduct on his party, other than that of the Department generally, of which he was Commissioner.

Although nominally consolidated below, the superior court issued separate decisions dismissing the respective complaints. As to the Williams/Levine request for declaratory relief, the court held that the equal protection issues were moot, in light of the Department of Motor Vehicles'

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[2] Valerie Quinn joined Woodard's complaint, but she did not join this appeal.

[3] Subsequently, the Department formalized this practice by adopting a rule. See Agency of Transportation, Department of Motor Vehicles, Rule 86-28-E ("Motor Vehicle Purchase and Use Tax") (July 5, 1986). The rule states that the credit provided in 32 V.S.A. § 8911(9) shall be available to Vermont residents only if the registrant "has not previously registered that vehicle in the state where it was acquired or in any other state." *Id.* at (1)(d). In materials filed with the proposed rule, the Department maintained that the "rule reflects the existing practice of the Department." Cover Sheet for Proposed Rule, Motor Vehicle Purchase and Use Tax (July 2, 1985).

1986 regulation denying the tax credit of § 8911(9) to Vermonters who purchase and *register* cars out of state. Upholding the regulation as consistent with the meaning and intent of the statute, the court reasoned: "Because section 8911(9) [as clarified by the regulation] now explicitly provides no special treatment for residents, it is facially constitutional and would survive the equal protection scrutiny used by the *Williams* court. Therefore, the plaintiffs no longer can request declaratory judgment . . . because the equal protection issues concerning what section 8911(9) means and how the exemption must be applied are now moot." As to their claim for a tax refund, the court held that recovery was barred by sovereign immunity, relying on *American Trucking Ass'ns v. Conway*, 146 Vt. 579, 508 A.2d 408 (1986), *cert. denied*, 483 U.S. 1019-20 (1989). As to the Woodard/Quinn complaint, the superior court reached the merits, upheld the Department's regulation against plaintiffs' several challenges, and granted the State's motion to dismiss.

Appeals were taken from both rulings. We affirm, but for reasons differing in several respects from those espoused by the superior court.

II. Claim for Refund

A. 42 U.S.C. § 1983

Both complaints are explicitly and solely founded on 42 U.S.C. § 1983, the Reconstruction Era civil rights statute which provides a private remedy for those alleging abridgment of federal rights by "persons" acting "under color of" state law. Although § 1983 was clearly intended to provide a federal forum for those seeking vindication

of federal rights, there is no bar to the statute's use in state courts. *Maine v. Thiboutot*, 448 U.S. 1, 11 (1980); *Beauregard v. City of St. Albans*, 141 Vt. 624, 626, 450 A.2d 1148, 1149 (1982).

However, § 1983 may not be used to make a claim for relief against a state, as states are not "persons" within the meaning of the statute. *Will v. Michigan Dep't of State Police*, 109 S.Ct. 2304, 2308 (1989). Manifestly and explicitly, the State of Vermont is the defendant in these cases. The purpose for each of these plaintiffs having commenced suit was and remains the refund of all or part of the Vermont use tax paid on their respective autos. The actions seek retrospective relief that can come only from the State treasury. "[W]hen the action is in essence one for the recovery of money from the state, the state is the real, substantial party in interest . . . even though individual officials are nominal defendants." *Ford Motor Co. v. Department of Treasury of Indiana*, 323 U.S. 459, 464 (1945). Under *Will*, § 1983 is not available for such relief.

At oral argument and in a supplementary brief, Mr. Williams suggested that footnote 10 of *Will*, 109 S.Ct. at 2311, supports his position, and exempts the present cases from the clear and general rule laid down by *Will*. We fail to see how. In pertinent part, footnote 10 states:

> Of course, a State official in his or her official capacity, when sued for injunctive relief, would be a person under § 1983 because "official capacity actions for *prospective relief* are not treated as actions against the State." This distinction is "commonplace in sovereign immunity doctrine," and would not have been foreign to the 19th-century Congress that enacted § 1983.

Id. at 2311 n.10 (citations omitted: emphasis supplied). The actions presently before this Court are not for prospective relief. Rather, these are actions to recover money already spent.[4] As Justice Stevens notes in dissent, the holding of *Will*, and in particular, footnote 10, is that while a state or its agent sued in an official capacity may be sued under § 1983 for injunctive relief, they may not be so sued for monetary relief. *Id.* at 2323.[5] Absent waiver, the Eleventh Amendment[6] bars a damages action

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[4] In an effort to style the relief requested as prospective, Mr. Williams also urges that he should be permitted to receive a credit against future taxes for any sums held wrongfully. Such a remedy is without support in law. If he were correct, such a "credit" would constitute nothing less than a total end run around the sovereign immunity doctrine. A state's immunity would be so tractable as to be useless.

[5] Footnote 10 of *Will* cites *Osborn v. Bank of United States*, 22 U.S. (9 Wheat.) 738 (1824), and *United States v. Lee*, 106 U.S. 196 (1882), among others, as cases presumably on the side of prospective relief; plaintiffs assert that the reference to these cases supports their position. *Osborn* does require certain state officials were already under an injunction not to take the funds. *Osborn* merely upholds a federal court's power to enforce an injunction ordering state officials not to violate federal law. In the present case, plaintiffs never obtained an injunction before paying the tax. In *Lee*, the Court ordered a return of wrongfully taken real property, and the case, in any event, was a suit against *federal* officers.

[6] The Eleventh Amendment to the United States Constitution provides:

> The Judicial power of the United States shall not be construed to extend to any suit in law or equity, commenced or prosecuted against one of the United States by Citizens of another State, or by Citizens or Subjects of any Foreign State.

(Continued on following page)

against the state brought in federal court; *Will* makes clear that § 1983 does not provide an avenue for the same relief in state court. "*Will* establishes that the State and arms of the State, which have traditionally enjoyed Eleventh Amendment immunity, are not subject to suit under § 1983 in either federal court or state court." *Howlett v. Rose*, 110 S. Ct. 2430, 2437 (1990); see also *Edelman v. Jordan*, 415 U.S. 651, 663, 678 (1974) (action to recover wrongfully withheld welfare payments from state funds barred as action against state); *Ford Motor Co. v. Department of Treasury of Indiana*, 323 U.S. at 462-63 (action seeking refund of taxes collected by state in violation of federal law barred as action against state); Note, *Clarifying Comity; State Court Jurisdiction and Section 1983 State Tax Challenges*, 103 Harv. L. Rev. 1888, 1896 (1990) (discussing import of *Will* on state tax litigation).

Accordingly, we reject plaintiffs' claims for monetary relief against the State or Commissioner Conway under § 1983.[7] Assuming the complaints also rest on state causes

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Although the text does not address suits against a state by its own citizens, the Supreme Court has long held that the Amendment's bar encompasses such suits. *Hans v. Louisiana*, 134 U.S. 1 (1890). By its terms, the Amendment restrains only the federal courts; "[n]o Eleventh Amendment question is present . . . where an action is brought in a state court." *Maine v. Thiboutot*, 448 U.S. 1, 9 n.7 (1980).

[7] Plaintiffs also argue on appeal that their causes of action proceed directly from the Fourteenth Amendment of the United States Constitution. See *Bivens v. Six Unknown Named Agents*, 403 U.S. 388, 389 (1971) (private damage action against federal officials implied from Fourth Amendment). We do not

(Continued on following page)

of action (although they are designated solely as § 1983 actions), we next consider the State's defense of sovereign immunity.

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believe a *Bivens*-type action may be brought directly under the Fourteenth Amendment in light of Congress' express provision in 42 U.S.C. § 1983 for a damage remedy against state officials who have violated federal law. The Court in *Bivens* created a remedy against *federal* officials, who are not subject to liability in § 1983 actions. "Indeed, one of the reasons the Court in *Bivens* held that individuals whose Fourth Amendment rights were violated by Federal officials had an implied cause of action for damages directly under the Constitution was that no other remedy was available." *Tarpley v. Greene*, 684 F.2d 1, 10 (D.C. Cir. 1982); see Zagrans, *"Under Color of" What Law: A Reconstructed Model of Section 1983 Liability*, 71 Va. L. Rev. 499, 591 n.472 (1985); Blackmun, *Section 1983 and Federal Protection of Individual Rights – Will the Statute Remain Alive or Fade Away?*, 60 N.Y.U. L. Rev. 1, 22 (1985) ("In *Bivens*, the Court put together a working equivalent of § 1983 for constitutional claims against federal officials"); cf. *Bush v. Lucas*, 462 U.S. 367, 380-90 (1983) (no damages remedy implied directly from Constitution where Congress has provided statutory remedies).

Plaintiffs rely on several early cases *seeking refunds of state or local taxes claimed to be unconstitutional. Iowa-Des Moines National Bank v. Bennett*, 284 U.S. 239 (1931); *Carpenter v. Shaw*, 280 U.S. 363 (1930); *Ward v. Love County*, 253 U.S. 17 (1920); *Gaar, Scott & Co. v. Shannon*, 223 U.S. 468 (1912); *Atchison, Topeka & Santa Fe Ry. v. O'Connor*, 223 U.S. 280 (1912). But none of these cases expressly provide a right of action directly under the Constitution. Indeed, four of them were initiated in state court and presumably were founded on state law causes of action. Only *Atchison* began in federal court, but the opinion does not specify on what basis federal jurisdiction was

(Continued on following page)

B. Sovereign Immunity

1. Scope of Remand

After remand from the United States Supreme Court and this Court, the State raised for the first time the defense of sovereign immunity. Initially, plaintiffs object to this defense on the ground that the Supreme Court remanded for the sole purpose of directing a refund. For several reasons, we reject this attempt to limit or avoid issues raised below.

(Continued from previous page)

grounded. In any event, all these cases long predate the development of modern § 1983 law, beginning with *Monroe v. Pape*, 365 U.S. 167 (1961). Finally, none of the cases cited by plaintiffs, except *Atchison*, address the question raised in this case, namely, whether an action seeking a refund of unconstitutionally levied taxes survives a state's assertion of sovereign immunity; and *Atchison* discusses sovereign immunity only obliquely: "If he [the defendant Secretary of State] had no right, as he had not, to collect the money, his doing so in the name of the State cannot protect him." 223 U.S. at 287. *Atchison* previews the Court's recent decision in *McKesson Corp. v. Division of Alcoholic Beverages and Tobacco*, ___ U.S. ___, ___, 58 U.S.L.W. 4665, 4668-69 (June 4, 1990), that due process requires that states provide a meaningful remedy for taxpayers challenging the constitutionality of their tax obligations. *Atchison* does not, however, say that a taxpayer may overcome sovereign immunity in a suit brought directly under the Fourteenth Amendment. Recent Eleventh Amendment decisions demonstrate the Supreme Court's unwillingness to override sovereign immunity absent a clear statement by *Congress* to that effect. See, e.g., *Atascadero State Hospital v. Scanlon*, 473 U.S. 234, 243 (1985). Federal sovereign immunity was not an issue in *Bivens* and its progeny because those cases involved suits not against the sovereign but against federal officials in their personal capacities. See *Carlson v. Green* 446 U.S. 14 (1980); *Davis v. Passman*, 442 U.S. 228 (1979).

The State first responded to the complaint by filing a motion to dismiss, asserting the constitutionality of its taxation scheme. That motion was granted by the superior court. As a matter of pleading, therefore, the State was not at that time required to file an answer or affirmative defenses – which were due only ten days after the motion was denied. V.R.C.P. 12(a). The United States Supreme Court ultimately denied the State's motion, and, until remand, no obligation to plead an affirmative defense existed. Unless somehow barred by the United States Supreme Court's mandate, the State's answer and affirmative defenses, filed September 12, 1985, were timely.[8] See *Patsy v. Board of Regents of State of Florida*, 457 U.S. 496, 515 n.19 (1982) (sovereign immunity defense may be raised on remand after appeal from lower court's dismissal of action on the pleadings). Therefore, plaintiffs' reliance on cases barring new issues after remand, when those cases had already been tried prior to appeal, is unavailing. The Supreme Court explicitly recognized that a full record had not been developed but that the "action was dismissed for failure to state a claim before an answer was filed." *Williams v. Vermont*, 472 U.S. at 28.

Plaintiffs suggest that their case was remanded from the Supreme Court "with specific instructions." To the contrary,

> in light of the fact that the action was dismissed on the pleadings, and given the possible relevance of state law, we express no opinion as to the appropriate remedy.

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[8] On September 9, 1985, this Court remanded the matter to Washington Superior Court.

> We hold only that, when the statute is viewed on its face, appellants have stated a claim of unconstitutional discrimination. The decision below is accordingly reversed, and the case is remanded for further proceedings not inconsistent with this opinion.

472 U.S. at 28 (citation omitted). It is clear that nothing more than the granting of the motion to dismiss was reversed; nothing else was decided. If further support were needed, it is supplied by the recent decision noting that "after invalidating a state tax scheme on Commerce Clause grounds, [the Supreme Court has] left state courts with the initial duty upon remand of crafting appropriate relief in accord with both federal and state law." *McKesson Corp. v. Division of Alcoholic Beverages and Tobacco*, ___ U.S. ___, ___, 58 U.S.L.W. 4665, 4669 n. 16 (June 4, 1990) (citing *Williams v. Vermont* as an example); accord *American Trucking Ass'ns v. Smith*, ___ U.S. ___, ___, 48 U.S.L.W. 4704, 4707 (June 4, 1990).

The Supreme Court, by its mandate, made no decision regarding affirmative defenses or remedial issues which might arise under state or federal law, or which might affect one or another remedy. The State was not precluded from arising a defense such as sovereign immunity.

2. Due Process Requirement of Remedy for Constitutional Violation

Plaintiffs argue that the Fourteenth Amendment prohibition against deprivation of property without due process of law[9] requires that they be afforded a remedy to

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[9] "[N]or shall any State deprive any person of life, liberty, or property, without due process of law." U.S. Const., amend. XIV, § 1.

secure return of improperly exacted taxes. They are correct.

> To satisfy the requirements of the Due Process Clause . . . in this refund action the State must provide taxpayers with, not only a fair opportunity to challenge the accuracy and legal validity of their tax obligation, but also a "clear and certain remedy" for any erroneous or unlawful tax collection to ensure that the opportunity to contest the tax is a meaningful one.

McKesson Corp. v. Division of Alcoholic Beverages, ___ U.S. at ___, 58 U.S.L.W. at 4671 (citation and footnote omitted). "[A] ruling that a tax is unconstitutionally discriminatory under the Commerce Clause places substantial obligations on the States to provide relief. . . . " *American Trucking Ass'ns v. Smith*, ___ U.S. at ___, 58 U.S.L.W. at 4708.

Vermont must afford a remedy and a meaningful remedy, but not any particular remedy. "[S]ome form of hearing is required before an individual is finally deprived of a property interest." *Mathews v. Eldridge*, 424 U.S. 319, 333 (1976), *quoted in McKesson Corp.*, ___ U.S. at ___ n.17, 58 U.S.L.W. at 4670 n.17. But that remedy is not, as a matter of constitutional necessity, a plenary suit in the court of general jurisdiction.

Our Legislature has provided a specific administrative procedure to afford plaintiffs the remedy to which they are constitutionally entitled. 32 V.S.A. § 8914 states:

> Any overpayment of [the motor vehicle purchase and use] tax as determined by the commissioner shall be refunded.

Plaintiffs concede that § 8914 covers unconstitutional taxes as well as arithmetic errors: "The statute makes not distinction between overpayments due to unconstitutionality or other causes." Brief for Appellants Williams and Levine at 19; Brief for Appellant Woodard at 27. See also *United States v. Dalm*, 110 S. Ct. 1361, 1368-69 n.6 (1990) ("The common sense interpretation is that a tax is overpaid when a taxpayer pays more than is owed, for whatever reason or no reason at all. . . . The word ['overpayment'] encompasses 'erroneously,' 'illegally,' or 'wrongfully' collected taxes. . . . ").

Prior to the United States Supreme court's decision, the remedy provided by § 8914 was not available to Williams and Levine to the extent they challenged the facial validity of § 8903, because the Commissioner of Motor Vehicles is not authorized to rule upon the constitutionality of the *statutes* he is bound to administer. See *Westover v. Village of Barton Elec. Dep't*, 149 Vt. 356, 357, 543 A.2d 698, 699 (1988). Nevertheless, after the Supreme Court's ruling that the use tax statute is facially unconstitutional, a complaint to the Commissioner under § 8914 would not have been futile.[10] The Commissioner at that point would not have been required to address the constitutionality of the statute, for that question had been

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[10] Neither § 8914 nor any other provisions of Chapter 219 of Title 32 ("Motor Vehicle Purchase and Use Tax") specify a limitations period for actions before the Commissioner pursuant to § 8914. Cf. 12 V.S.A. § 517 (one-year limitation period on actions in court to recover taxes paid under protest). We do not here decide what, if any, statute of limitations is generally applicable to such actions.

decided; he would have been faced instead with three potential questions: Did the Department in fact *administer* the use tax statute in a manner that discriminated against nonresidents? If not, did the Department's enforcement of the tax, eventually pursuant to Rule 86-28-E, comply with the statute? If it did comply with the statute, did the practice violate the Commerce or Privileges and Immunities Clauses?[11] Plaintiff Woodard also challenged the Department's practice on statutory grounds, and raised additional constitutional challenges to the use tax *as administered* in the case of Vermont residents who registered their cars out of state before bringing them to Vermont. The Commissioner had jurisdiction to decide all of these claims. See *Alexander v. Town of Barton*, 152 Vt. 148, 151, 565 A.2d 1294, 1296 (1989) (while administrative agencies cannot rule on the constitutionality of legislation, they can adjudicate constitutional questions in determining validity of statutorily-delegated agency practices); *Christian Brothers Institute of New Jersey v. Northern New Jersey Interscholastic League*, 86 N.J. 409, 416, 432 A.2d 26, 29 (1981) (administrative agency may rule on constitutional issues relevant and necessary for resolution of questions within scope of its jurisdiction); 4 K. Davis, Administrative Law Treatise § 26:15, at 480 (2d ed. 1983) (exhaustion of administrative remedies "may be required when a factual context is needed for deciding the constitutional question or when the objecting party may prevail

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[11] The United States Supreme Court declared the tax scheme facially invalid under the Equal Protection Clause; Williams and Levine continue to argue that the statute, even as interpreted and administered by the Department, violates the Privileges and Immunities and Commerce Clauses.

on nonconstitutional grounds"). The first question posed by Williams and Levine, in particular, was suited to agency determination. See *Weinberger v. Salfi*, 422 U.S. 749, 765 (1975) ("Exhaustion is generally required as a matter of preventing premature interference with agency processes, so that the agency may function efficiently and so that it may have an opportunity to correct its own errors, to afford the parties and the courts the benefit of its experience and expertise, and to compile a record which is adequate for judicial review."). All plaintiffs in this case, therefore, had an available remedy in § 8914 but chose not to pursue it.

One further point must be addressed. In *American Trucking Ass'ns v. Conway*, 146 Vt. 579, 508 A.2d 408 (1986), this Court considered a constitutional challenge to statutes imposing certain fees on foreign-registered trucks. While ruling that the statutes at issue violated the Commerce Clause of the United States Constitution, we upheld the superior court's refusal to order a refund of fees collected pursuant to the objectionable statutes. "This action for a tax refund is a suit against the state, and therefore, is barred by sovereign immunity unless the state has waived its immunity." *Id.* at 587-88, 508 A.2d at 414. We found that 23 V.S.A. § 3020(b), authorizing the Commissioner to refund a tax or fee that "has been illegally or erroneously collected or computed," did not constitute a waiver of sovereign immunity. The statute, we wrote, "merely provides for a refund mechanism if errors are made in determining what tax is imposed. . . . Here, the Vermont legislature has not inferentially indicated its intent to provide the amounts paid to the state

under a statute later declared invalid." *Id.* at 588, 508 A.2d at 414.

We recognize that our construction of 23 V.S.A. § 3020(b) in *American Trucking Ass'ns* is incompatible with the meaning we have ascribed to 32 V.S.A. § 8914 in this opinion. The term "overpayment" in § 8914, if anything, implies a narrower authority to award refunds than the term "illegally or erroneously collected" in § 3020(b); yet, as we have explained, § 8914 does provide a remedy to recover "amounts paid to the state under a statute later declared invalid." The Court's confined reading of § 3020(b) was grounded in an understanding of common-law sovereign immunity that is no longer tenable after the Supreme Court's recent unanimous decisions in *McKesson Corporation* and *Howlett v. Rose*. Thus, in *American Trucking Ass'ns*, we said that "the state cannot be sued without its consent for injuries resulting from the exercise of functions essentially governmental in character." 146 Vt. at 587, 508 A.2d at 413. But due process may require that states entertain suits against them though they have not consented. That is the holding of *McKesson*: "[I]f a State places a taxpayer under duress promptly to pay a tax when due and regulates him to a postpayment refund action in which he can challenge the tax's legality, the Due Process Clause of the Fourteenth Amendment obligates the State to provide meaningful backward-looking relief to rectify any unconstitutional deprivation." ___ U.S. at ___, 58 U.S.L.W. at 4668-69 (footnotes omitted). *Howlett* specifically holds that the Supremacy Clause does not permit a state law defense of sovereign immunity in a § 1983 action brought in state court where a sovereign immunity defense would not be available had the action

been brought in a federal forum. ___ U.S. at ___, 58 U.S.L.W. at 4761. "[A]s to persons that Congress subjected to liability, individual States may not exempt such persons from federal liability by relying on their own common law heritage." *Id.* at ___, 58 U.S.L.W. at 4763. The import of these decisions cannot be avoided. Section III of the Court's opinion in *American Trucking Ass'ns* should be considered overruled.

Common-law sovereign immunity, however, is not vitiated entirely. A state must provide some remedy to permit the recoupment of unconstitutionally exacted taxes, but it may choose, and limit, the remedy, so long as it comports with due process principles. *McKesson* notes that "States may avail themselves of a variety of procedural protections against any disruptive effects of a tax scheme's invalidation, such as providing by statute that refunds will be available to only those taxpayers paying under protest, or enforcing relatively short statutes of limitation applicable to refund actions." ___ U.S. at ___, 58 U.S.L.W. at 4674. The Court added that "[s]uch procedural measures would sufficiently protect States' fiscal security when weighed against their obligation to provide meaningful relief for their unconstitutional taxation." *Id.* Vermont has consented to suit for the recovery of wrongfully levied purchase and use taxes by providing in 32 V.S.A. § 8914 for administrative complaint to the Commissioner of Motor Vehicles. Because that remedy provides taxpayers with due process – indeed, plaintiffs have not challenged the sufficiency of the remedy – the defense of sovereign immunity in a court of plenary jurisdiction remains intact and available to the State.

The superior court could not award a refund of taxes absent the State's waiver of immunity, and, therefore, properly dismissed plaintiffs' claims for monetary relief.

III. Declaratory Relief

Following the Supreme Court's ruling that the statute contravened the Equal Protection Clause, *Williams v. Vermont*, 472 U.S. at 28, the State argued on remand that the Department had not in fact administered the tax in a discriminatory manner, and, to clarify its position, had promulgated Rule 86-28-E. See note 3, *supra*. The superior court agreed, holding that the new rule eliminated the discriminatory treatment of nonresidents and thereby rendered the request for declaratory judgment moot. On appeal, Williams and Levine contend that the statute, even as interpreted and administered by the Department, continues to violate the Privileges and Immunities and Commerce Clauses. They also argue, in an effort to avoid the conclusion that the new rule has rendered their equal protection challenge moot, that the rule contradicts legislative intent and the plain meaning of 32 V.S.A. § 8911(9).

In his complaint and on appeal, Woodard also requests a declaratory ruling that the Department's enforcement of its tax scheme violates the governing statute. Woodard further raises state and federal constitutional challenges to the scheme as administered. In Woodard's case, the superior court also dismissed the complaint, but reached the merits of his claims, essentially granting declaratory relief to the State.

All three plaintiffs' requests for declaratory rulings on federal constitutional issues assertedly arise under 42

U.S.C. § 1983. Of course, plaintiffs' claims that are grounded on a violation of a state statute or the Vermont Constitution are not properly brought under 42 U.S.C. § 1983 because that statute remedies the deprivation of rights secured by federal law. See *Maine v. Thiboutot*, 448 U.S. at 4. As to all claims, we find that the superior court did not have jurisdiction to award declaratory relief. The § 1983 claims, however, raise certain additional considerations, as addressed below.

Vermont law affords the superior court general authority to grant declaratory relief. 12 V.S.A. §§ 4711-25. Moreover, the Administrative Procedure Act provides for declaratory judgment actions to challenge the "validity or applicability of a rule . . . if it is alleged that the rule, or its threatened application, interferes with or impairs, or threatens to interfere with or impair, the legal rights or privileges of the plaintiff." 3 V.S.A. § 807. The declaratory remedy, however, does not enlarge the jurisdiction of the court. *Demag v. American Ins. Co.*, 146 Vt. 608, 610, 508 A.2d 697, 698 (1986). If the Legislature has designated another tribunal to hear certain claims, the declaratory judgments statutes do not *ipso jure* vest jurisdiction over those claims in the superior court. In *Demag*, for example, the plaintiff sought a declaration that she was entitled to receive certain death benefits under the Workers' Compensation Act. We held that the superior court had no jurisdiction over this claim, "because plaintiff failed to avail herself of the administrative remedy provided by the Workers' Compensation Act." *Id.* Similarly, in *Trivento v. Commissioner of Corrections*, 135 Vt. 475, 380 A.2d 69 (1977), we considered whether the superior court had

jurisdiction to issue a declaratory ruling on the constitutionality of a state prisoner's confinement. We held that it did not.

> Where the Legislature has provided that certain rights (here the right to have one's sentence modified) are enforceable in specified tribunals (here the superior court in which sentence was imposed), the declaratory judgments vehicle should not be used to frustrate the legislative choice. To do so would be to ignore the message of 12 V.S.A. § 4711 and our prior holdings that the Act has not enlarged the subject matter jurisdiction of the courts.

Id. at 478, 380 A.2d at 71-72; see also *Petition of D.A. Associates*, 150 Vt. 18, 20, 547 A.2d 1325, 1326-27 (1988) ("when an administrative remedy is established by statute or regulation, relief must not only be sought in accordance therewith, but must first be exhausted before recourse to the courts is available"). But see *Neal v. Brockway*, 136 Vt. 119, 121, 385 A.2d 1069, ___ (1978) ("bare existence of another adequate remedy is not a bar to a declaratory judgment proceeding where a controversy exists").

Declaratory relief would not give plaintiffs what they want; it would only advise the ultimate decision-maker on points of law necessary to get a refund. As we have made clear, the superior court does not have jurisdiction over the refund claims in this case absent a waiver of sovereign immunity. To the extent plaintiffs seek declaratory rulings in order to obtain their refunds, the superior court likewise lacks jurisdiction to award the requested declaratory relief. As in *Trivento* and *Demag*, plaintiffs may pursue their claims in another forum; the general

statutory authority vested in the superior court to award declaratory judgments does not permit litigants to raise such claims, by their own bootstraps, where jurisdiction is otherwise lacking. The judiciary is not empowered to render advisory opinions the sole purpose of which is to aid in the resolution of a dispute that properly belongs in another tribunal. See *Lace v. University of Vermont*, 131 Vt. 170, 175, 303 A.2d 475, 478 (1973).

Plaintiffs' requests for declaratory relief could not be decided in the superior court, therefore, unless such requests are justiciable on their own account, detached from the refund claims.[12] The availability of declaratory or any other particular relief does not alter the fundamental prerequisite to judicial authority – a justiciable controversy.

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[12] Even if the declaratory issues were justiciable, "the courts look with disfavor on piecemeal litigation of the matters in controversy." 10A C. Wright, A. Miller & M. Kane, Federal Practice and Procedure: Civil § 2759, at 648 (2d ed. 1983) (hereinafter Wright, Miller & Kane). Thus, "federal courts have expressed a strong preference that issues of state taxation be litigated in state courts through a suit for refund rather than in federal courts through a suit for declaratory or injunctive relief." *Alcan Aluminium [sic] Ltd. v. Department of Revenue of State of Oregon*, 724 F.2d 1294, 1298 (7th Cir. 1984). The disfavor toward piecemeal litigation, however, is not generally treated as jurisdictional, but rather as a matter of discretion. See 10A Wright, Miller & Kane § 2759; cf. 12 V.S.A. § 4716 ("The court may refuse to render or enter a declaratory judgment or decree where such judgment or decree, if rendered or entered, would not terminate the uncertainty or controversy giving rise to the proceeding."). Similarly, "[d]eclaratory relief ordinarily should not be granted if a special statutory proceeding has been

(Continued on following page)

> The function of a declaratory judgment is to provide a declaration of rights, status and other legal relations of parties to a justiciable controversy. Without such justiciable controversy being present, the declaratory judgment can provide no more than an advisory opinion, which our State judiciary does not have the constitutional power to render.

Lace v. University of Vermont, 131 Vt. at 175, 303 A.2d at 478 (citations omitted). "It is well settled that an action for declaratory relief must be based on an actual controversy; the claimed result or consequences must be so set forth that the court can see that they are not based upon fear or anticipation but are reasonably to be expected." *Robtoy v. City of St. Albans*, 132 Vt. 503, 504, 321 A.2d 45, 46-47 (1974); accord *Beecham v. Leahy*, 130 Vt. 164, 168, 287 A.2d 836, 838 (1972). The administrative Procedure Act codifies these limits on the court's power over suits testing the validity of agency rules by requiring "that the

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provided for the determination of particular questions." 10A Wright, Miller & Kane § 2758, at 642. This rule of abstention may be circumvented in the court's discretion. For example, in *Katzenbach v. McClung*, 379 U.S. 294, 296 (1964), which upheld the constitutionality of federal law prohibiting racial discrimination at restaurants, the Supreme Court reached for the merits although the plaintiffs had not pursued their claims as provided by statute, because interference with government action had already occurred (the district court had enjoined the government from enforcing the Civil Rights Act against the restaurant) and the constitutional issues were already before the Court in a companion case. *Id.* These considerations are not present here, and we do not decide whether the rule applied in *Demag* and *Trivento* would give way were similar considerations present.

rule, or its threatened application, interferes with or impairs, or threatens to interfere with or impair, the legal rights or privileges of the plaintiff." 3 V.S.A. § 807.

Our law conforms with the longstanding federal rule that the availability of declaratory relief turns on whether "the facts alleged, under all the circumstances, show that there is a substantial controversy, between parties having adverse legal interests, of sufficient immediacy and reality to warrant the issuance of a declaratory judgment." *Maryland Casualty Co. v. Pacific Coal & Oil Co.*, 312 U.S. 270, 273 (1941). A mere abstract question or hypothetical threat is not a sufficient basis for a declaratory judgment. *Golden v. Zwickler*, 394 U.S. 103, 108 (1969). Extra caution is advised in cases involving political and constitutional questions. "The power of courts, and ultimately of this Court to pass upon the constitutionality of acts of Congress arises only when the interests of litigants require the use of this judicial authority for their protection against actual interference. A hypothetical threat is not enough." *United Public Workers v. Mitchell*, 330 U.S. 75, 89-90 (1947).

It is apparent in the present cases that, once severed from the refund claims, no justiciable controversy exists. Williams has now lived in Vermont close to ten years, and we may take judicial notice that he has been a member of the bar of this Court for that period. Levine has lived in the state even longer. Neither suggests a reasonable fear or anticipation of being subject again to the allegedly unconstitutional use tax – that is, of purchasing and registering a vehicle out of state, while enjoying residency in another state, and subsequently seeking to register the car in Vermont. Similarly, Woodard is not likely

again to purchase a car out of state and again fail to secure Vermont registration by mail at the outset, thereby avoiding the potential of double taxation.

The United States Supreme Court's opinion in *Golden v. Zwickler* is particularly instructive. Zwickler had distributed an unsigned political handbill, castigating a certain congressman for his stance on a foreign-aid issue. For that act, he was prosecuted under a New York statute barring anonymous election literature. His conviction was reversed on state law grounds, but the statute remained in force. Zwickler then brought suit for a declaratory judgment on the statute's validity. 394 U.S. at 104-05. Writing for a unanimous court, Justice Brennan noted that the criticized congressman had left that office for a fourteen-year term as a state supreme court justice, and concluded: "We think that under all the circumstances of the case the fact that it was most unlikely that the Congressman would again be a candidate for Congress precluded a finding that there was 'sufficient immediacy and reality' [to justify issuance of a declaratory judgment]." *Id.* at 109 (quoting *Maryland Casualty*, 312 U.S. at 273).[13]

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[13] The facts in the present cases and in *Zwickler* must be distinguished from those cases where plaintiffs demonstrate a strong likelihood of a recurrence of the controversy in litigation. For example, in *Washington v. Harper*, ___ U.S. ___, 58 U.S.L.W. 4249 (Feb. 27, 1990), a mentally ill prisoner sought declaratory relief regarding prison procedures for forced medication. The Supreme Court there took particular note that given Harper's medical history, it remained likely that officials would seek to administer antipsychotic medications to him in the future. *Id.* at ___, 58 U.S.L.W. at 4252. The Court accordingly reached the merits.

Declaratory relief is, and can be, sought in this case only to further the true goal of obtaining other relief, namely a refund. Because the superior court has no jurisdiction over the refund claim, it also has no jurisdiction to issue advisory declaratory relief.

The superior court's declaratory judgment ruling is vacated; otherwise, its orders dismissing the two complaints are affirmed.

FOR THE COURT:

/s/ Mathew J. Katz
Superior Judge,
Specially Assigned

STATE OF VERMONT
Office of Secretary of State

I certify that the attached is a true copy of the adopted rule, "Motor Vehicle Purchase and Use Tax" (86-28-E) of the Agency of Transportation, Department of Motor Vehicles. The effective date of this rule is July 5, 1986.

SEAL

February 26, 1987
Date

/s/ Paul D. Guare
Deputy Secretary of State

The purpose of this rule is to interpret, and to assist in the implementation of 32 V.S.A. §8911(9), and to be declarative of the practice used by the Department of Motor Vehicles with respect to its administration.

The credit provided in and by 32 V.S.A. §8911(9) shall be available to the following persons in the circumstances set forth below:

1. A resident of Vermont, as defined in 32 V.S.A. §8902(2), shall be entitled to receive a pro rata credit for a sales or use tax paid to another state upon the submission to the Department of an application for Vermont registration, and the payment of the registration fees if:

a. The state in which the vehicle was acquired would grant the same pro rata credit for Vermont tax paid under similar circumstances, and

b. The tax paid to that state is nonrefundable, and

c. The vehicle acquired is a pleasure car, and

d. The person applying for a Vermont registration has not previously registered that vehicle in the state where it was acquired or in any other state.

2. For the purpose of this rule, the applicant shall have the burden of proving to the Department's satisfaction that

a. The state in which the vehicle was acquired would grant the same pro rata credit for Vermont tax paid under similar circumstances, and

b. The tax paid is nonrefundable, and

c. That the person applying for a Vermont registration has not previously registered that vehicle in the state where it was acquired or in any other state.

3. For the purpose of this rule, a vehicle shall not be considered to have been registered if the applicant has been issued an intransit permit.

§ 8911. Exceptions

The tax imposed by this chapter shall not apply to:

(1) motor vehicles owned or registered by any state or province or any political subdivision thereof;

(2) motor vehicles owned and operated by the United States of America;

(3) motor vehicles owned and registered by religious or charitable institutions or volunteer fire companies;

(4) motor vehicles owned and operated by a dealer and registered and operated under the provisions of sections 451-468 inclusive of Title 23;

(5) nonregistered motor vehicles other than tow or repairman vehicles;

(6) [Repealed.]

(7) motor vehicles, title to which on the effective date of this chapter is in the owner seeking registration thereof;

(8) motor vehicles transferred to the spouse, mother, father or child of the donor or subsequently transferred among such individuals provided such motor vehicle has been registered in this state in the name of the original donor;

(9) pleasure cars acquired outside the state by a resident of Vermont on which a state sales or use tax has been paid by the person applying for a registration in Vermont, providing that the state or province collecting

such tax would grant the same pro-rata credit for Vermont tax paid under similar circumstances. If the tax paid in another state is less than the Vermont tax the tax due shall be the difference;

(10) motor vehicles registered in Vermont by the transferor and transferred between that individual and a business entity controlled by him, if the transfer is exempt under section 351 of the United States Internal Revenue Code in effect July 1, 1966;

(11) motor vehicles owned or purchased in another state by a member of the armed forces on full time active duty or his spouse upon which a purchase, use or sales tax has been paid in another state, except that, if that tax is less than the tax payable in this state but for this subdivision, the tax applies in the amount of the difference;

(12) motor vehicles owned and operated by physically handicapped persons for whom the vehicle's controls have been altered to enable such persons to drive. This exception shall apply only when such handicapped person has been certified exempt from the tax by the commission of motor vehicles under the provisions of section 8901 of this title;

(13) motor vehicles obtained from the government as excess government property, or vehicles purchased with 100 percent federal funds and used for federally suported [sic] local programs. – 1959, No. 327 (Adj. Sess.), § 10, eff. March 1, 1960; amended 1966, No. 66 (Sp. Sess.), § 5; 1967, No. 116, § 5, eff. April 17, 1967; 1975, No. 96, § 1, eff. April 30, 1975; 1977, No. 258 (Adj. Sess), § 4, eff.

April 19, 1978; 1979, No. 202 (Adj. Sess.), § 3, Pt. VI, eff. Sept. 1, 1980.

(2)

No. 91-612

Supreme Court, U.S.
FILED
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IN THE

Supreme Court of the United States

OCTOBER TERM, 1991

JAMES WOODARD,

Petitioner,

v.

STATE OF VERMONT and WILLIAM H. CONWAY, JR., COMMISSIONER, VERMONT DEPARTMENT OF MOTOR VEHICLES,

Respondents.

On Petition for a Writ of Certiorari to the Supreme Court of the State of Vermont

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JAMES WOODARD,

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On Petition for a Writ of Certiorari to the Supreme Court of the State of Vermont

---

BRIEF IN OPPOSITION

COUNTERSTATEMENT OF THE CASE

A. Summary

Petitioner contends that the State of Vermont administers its motor vehicle purchase and use tax in a way that discriminates against residents who purchase *and* register an automobile elsewhere as opposed to those who merely purchase an automobile elsewhere but register it in Vermont. He contends that residents who purchase and register a car outside Vermont qualify for a tax credit against

the Vermont tax equal to the out-of-state sales tax. The State disputes this contention. The tax credit is available to every Vermont resident who merely purchases a car outside Vermont, but is not available to any resident who also registers the car out-of-state. *See e.g.*, App. 50a-53a (deposition excerpts of Clinton Krauss).

In 1985 this Court held that the tax credit statute, 32 V.S.A. § 8911(9) (Pet. App. at 31), was discriminatory on its face and remanded the case for preceedings consistent with its opinion. *Williams v. Vermont*, 472 U.S. 14 (1985). The Court said it was "conceivable that, were a full record developed, it would turn out that in practice the statute does not operate in a discriminatory fashion." *Id.* at 28. The Court also noted that the action had been "dismissed for failure to state a claim before an answer was filed," and "express[ed] no opinion as to the appropriate remedy." *Id.* The Court also found that "[t]he credit may rationally further Vermont's legitimate interest in facilitating Vermonters' out-of-state purchases, but this interest does not extend to the facilitation of Vermonters' out-of-state use." *Id.* at 27. And it further observed that "the State's submission (that the tax credit does not apply when the taxpayer has registered the car out-of-state), if it is to be accepted, would negate any claim that appellants were treated differently than Vermont residents in similar circumstances." *Id.* at 19.

After the Supreme Court announced its decision, Vermont promulgated a regulation to confirm its administrative practice. The regulation expressly provides that the credit is not available to a Vermont resident who has "previously registered that vehicle in the state where it was acquired or in any other state." Pet. App. 29-30.

Also subsequent to the Court's remand of *Williams*, Petitioner commenced this action.[1] On its face, the action

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[1] Petitioner never pursued his administrative remedy by petitioning the Commissioner for a refund pursuant to 32 V.S.A. § 8914.

was brought pursuant to 42 U.S.C. § 1983 and 1988 (App. at 4a) against then-Commissioner William Conway in his official capacity (App. at 4a). Furthermore, then-Commissioner Conway was served process only in his official capacity by service upon the Office of Attorney General pursuant to V.R.C.P. 4(d)(2) (App. at 6a). *See also* App. at 44a (Rule 4[d][2]).

Shortly thereafter, the trial court designated Petitioner's complaint a complex action and consolidated it with the remanded *Williams v. Vermont*, Docket No. S436-82WnC (App. at 8a-9a and 13a).

Upon remand of *Williams* the State filed an answer, pled sovereign immunity (App. at 19a) and ultimately won dismissal of the consolidated cases. Pet. App. 5-7 and App. 13a-18a and 32a-43a. On appeal, the Vermont Supreme Court held that the State and an official sued in an official capacity could not be held liable for damages under 42 U.S.C. § 1983. Pet. App. 7-11. It held that Vermont law established an administrative remedy for Petitioner's tax claims, but did not establish a parallel remedy in its courts of plenary jurisdiction. *Id.* 14-21. It held that Petitioners had failed to state a claim for declaratory relief in the superior court.

Certiorari was denied in the consolidated, and then companion, *Williams v. Vermont*, Docket No. 90-1935, *cert. den.*, 60 U.S.L.W. 3219 (U.S. Oct. 7, 1991). (*Williams II*).

B. Factual Background

Petitioner Woodard (like Petitioners Williams and Levine in *Williams*), paid the Vermont motor vehicle and use tax to the State of Vermont, and not to Respondent William Conway, the Vermont Commissioner of Motor Vehicles. As the Vermont Supreme Court observed, "Manifestly and explicitly, the State of Vermont is the defendant in these cases." Pet. App. 8. And, although

Mr. Woodard may have "arrived back" in Vermont in February, 1985, shortly after purchasing and registering his car in Florida, he did not attempt to register it in Vermont until Summer, 1985. Petition at 5. This was several months after he returned to Vermont, *id.*, and should have registered the vehicle in Vermont. *See* 23 V.S.A. §§ 4(30) and 301. (App. 47a and 48a).

1. *Superior Court Action*

Petitioner commenced the action in February, 1986. Petitioner's complaint, dated February 3, 1986, was "explicitly and solely founded in 42 U.S.C. § 1983" (Pet. App. at 7), and Paragraph 5 of the complaint included Commissioner Conway only in his official capacity. See also the Acceptance of Service in this case (App. at 6a). *See also* App. at 4a (Complaint). Petitioner's complaint was not an application for review of governmental action pursuant to Rule 75 of the Vermont Rules of Civil Procedure (*see* App. 1a-5a) or an appeal to the Supreme Court under 3 V.S.A. § 815, and the availability of those remedies were not an issue in the case. *Compare* Petition at 17-18.

The superior court permitted extensive discovery in the consolidated *Williams* and *Woodard* cases, and the parties developed a substantial record before the court granted the State's motions to dismiss. [Under the Vermont rules of procedure, as under the federal rules, the defense of failure to state a claim may be raised at any time up to trial. *See* V.R.C.P. 12(h) (App. 45a).] The enormity of the record in the consolidated cases is reflected in the court's Supplemental List of Documents in the *Williams II* case (App. 21a-31a), the list of one hundred plus documents filed in the trial court after remand from the United States Supreme Court and the List of Documents in the present case, App. 10a-12a. The extent of the dis-

covery in the consolidated cases is indicated by the title of one of these documents: item #131 (App. 29a) was "Plaintiffs' Motion to File *Fifth* Set of Interrogatories and Requests to Produce and Plaintiffs' *Fifth* Set of Interrogatories and Requests to Produce" (emphasis added).

The discovery materials show that two Vermont residents managed to obtain tax credits even though they had first registered their cars in other states. Petition in *Williams II* at 8. However, the discovery materials also show that these instances were aberrations contrary to State policy. The State policy from 1980 to the present has been to deny the tax credit to registrants who first register their vehicles outside Vermont. *See* App. 50a-59a (deposition excerpts of Clinton Krauss 50a-53a, Thomas McCormick 54a, Harrold Cone 55a, Dean Martin 57a and Louis Theriault 58a-59a).

2. *Vermont Supreme Court*

The Vermont Court did not dismiss the § 1983 claims because it "assumed Respondent Conway was being sued only in his official capacity." *Compare* Petition at 8, n.2. The record reflects, App. 3a-5a, and the Court noted that

> [n]one of the plaintiffs specify any relief against Commissioner Conway personally. Nor are any allegations made to suggest any conduct on his party, other than that of the Department generally, of which he was Commissioner. Pet. App. 6.

Furthermore, the only service or acceptance of service in this case was upon the Office of Attorney General pursuant to V.R.C.P. 4(d)(2). *See* App. at 6a, and at 44a for the rule.

REASONS FOR DENYING CERTIORARI

Certiorari should be denied because, contrary to Petitioner's assertions:

1. The Vermont courts gave full effect to the mandate of this Court in *Williams v. Vermont.*

2. The Vermont Supreme Court correctly applied *Will v. Michigan* and Vermont law, and properly rejected Petitioner's claims for damages and declaratory relief.

3. Vermont's administrative remedy for resolving tax disputes satisfies due process.

I. THE VERMONT COURTS GAVE FULL EFFECT TO THE MANDATE OF THIS COURT IN *WILLIAMS v. VERMONT.*

Petitioner contends that review is essential to ensure that this Court's decision in the *Williams* case is given proper effect. Petition at 10. He further claims that review is essential "to resolve fundamental constitutional issues." *Id.* He claims the Vermont courts "failed to require a factual determination as to whether . . . the Vermont purchase and use tax credit is administered in a fashion that satisfies the Equal Protection Clause." *Id.*

The record tells a different story. In 1985 this Court noted that Williams' complaint had been dismissed "before an answer was filed", and ordered "further proceedings not inconsistent with this opinion." 472 U.S. at 28. The expectation was that the State would file an answer and defend the action, and that is exactly what happened. On September 12, 1985, three days after the case was remanded to the superior court, the State filed an answer in *Williams* and raised affirmative defenses including Williams' failure to state a claim. In Petitioner Woodard's case, Vermont filed a motion to dismiss for failure to state a claim upon which relief can be granted. *See* Pet. App. 12; *see also* App. 7a. The Vermont courts

did not take any "liberties" in allowing the State to plead to the complaint or in ruling on those pleadings.

Petitioner's claim that the Vermont courts "failed to require a factual determination as to whether . . . the Vermont purchase and use tax credit is administered in a fashion that satisfies the Equal Protection clause" is wrong on two counts. First, it ignores the legal bases for the Vermont Supreme Court's opinion: first, that the § 1983 claim was brought against the state and a state official in his official capacity (Pet. App. at 7-11); second, that the superior court lacked jurisdiction to grant declaratory relief (Pet. App. at 21-28); and third, that Vermont law affords Petitioner an administrative remedy for tax refunds (Pet. App. at 14-21). Second, it ignores the fact that respondents have consistently interpreted the statute to mean that all residents, whether old or new, should be treated alike, and have administered it accordingly. *See* App. 13a-15a and 37a-39a (trial court analyses and construction of the statute) and App. 50a-54a (Krauss and McCormick depositions).

Petitioner's assertion that the Vermont courts prevented him from obtaining evidence is also unfounded. Discovery was finally halted by the ruling on the State's Motion to Dismiss, but not until the plaintiff in the consolidated, companion case, *Williams II*, had taken seventeen depositions and served five sets of interrogatories and requests to produce. *See* App. 21a-31a (Supplemental List of Documents). This level of activity was all the more remarkable because, for the most part, it was conducted, and sanctioned by the court, after the State had filed its motions to dismiss on legal grounds.

II. THE VERMONT SUPREME COURT CORRECTLY APPLIED *WILL v. MICHIGAN* AND VERMONT LAW AND PROPERLY REJECTED PETITIONER'S CLAIMS FOR DAMAGES AND DECLARATORY RELIEF.

Petitioner sued in state court and named the State of Vermont and William Conway, the Vermont Commissioner of Motor Vehicles, as defendants. He based his action explicitly and solely on § 1983. (App. 3a-5a, and Pet. App. 7). However, he served process only on the Attorney General's Office (App. 6a), and therefore sued Commissioner Conway in his official capacity only. Petitioner's monetary claims, claims for tax refunds, would have been paid from the State treasury.

The Vermont Supreme Court's decision that Petitioner thus failed to state a money damages claim under § 1983 is supported by several decisions of this Court. "(W)hen the action is in essence one for the discovery of money from the state, the state is the real, substantial party in interest . . . even though individual officials are nominal defendants." *Ford Motor Co. v. Department of Treasury of Indiana*, 323 U.S. 459, 464 (1945). Under *Will v. Michigan Deartment of State Police*, 491 U.S. 58 (1989), § 1983 is not available for such relief. "*Will* establishes that the State and arms of the State, which have traditionally enjoyed Eleventh Amendment immunity, are not subject to suit under § 1983 in either federal court or state court." *Howlett v. Rose*, 110 S. Ct. 2430, 2437 (1990).

The Vermont Supreme Court's decision on Petitioner's claim for declaratory relief was also in accord with prior law. The issue in this regard was whether the superior court had jurisdiction to award declaratory relief. The Vermont Supreme Court held that the superior court did not have such jurisdiction because the Vermont Legislature had designated another tribunal to hear Petitioner's tax claims and because the declaratory issues were not "justiciable on their own account, detached from the refund claims." Pet. App. 21-28. This reasoning conforms

with the applicable Vermont statutes and case law and does not raise federal issues. *See* 12 V.S.A. §§ 4711-25 (Vermont Declaratory Judgments Act); 3 V.S.A. § 807 (Vermont Administrative Procedure Act provision for declaratory judgment actions); *Demag v. American Ins. Co.*, 146 Vt. 608, 610, 508, A.2d 697, 698 (1986) (superior court lacked jurisdiction because plaintiff did not pursue administrative remedy); *Lace v. University of Vermont*, 131 Vt. 170, 175, 303 A.2d 475, 478 (1973) (without justiciable controversy the declaratory judgment can provide no more than advisory opinion, which Vermont judiciary does not have power to render).

As in *Williams II*, a petition for *certiorari* from the same Vermont Supreme Court decision, this case is not an occasion for resolving any disagreement among the states on whether state courts must entertain tax challenges under § 1983, as Petitioner has suggested. The Vermont Supreme Court did not reject the possibility of a state court action to challenge a tax on constitutional grounds. It recognized that "Although § 1983 was clearly intended to provide a federal forum for those seeking vindication of federal rights, there is no bar to the statute's use in state courts. *Maine v. Thiboutot*, 448 U.S. 1, 11 (1980); *Beauregard v. City of St. Albans*, 141 Vt. 624, 626, 450 A.2d 1148, 1149 (1982)." (Pet. App. 7-8). At the same time it also recognized, properly, that the state and a state official sued in his official capacity are not persons subject to suit under § 1983.

III. VERMONT'S ADMINISTRATIVE REMEDY FOR RESOLVING TAX DISPUTES SATISFIES DUE PROCESS.

Petitioner additionally claims that "the administrative remedy conjured up by the Vermont Supreme Court fails to satisfy minimum Federal due process requirements." Pet. at 17. This claim is without merit.

Petitioner cites *McKesson Corp. v. Division of Alcoholic Beverages and Tobacco*, 110 S. Ct. 2238 (1990). Properly cited, *McKesson* stands for the proposition that due

process does not require that states provide an opportunity for a hearing prior to the exaction of taxes so long as they provide a post-deprivation procedure in which refunds or other suitable relief are available. *Id.* at 2250-51. Vermont provides post-deprivation relief through the administrative process of 32 V.S.A. § 8914 and judicial review. *See* Pet. App. 14-18 and App. 49a.

Title 23 V.S.A. §§ 105-107 (App. 47a-48a) gives the Commissioner of Motor Vehicles authority to conduct hearings, subpoena witnesses, and cause other acts normally associated with administrative litigation—including discovery. The Commissioner may also appoint hearing officers to conduct hearings; in fact, this is the Commissioner's customary method for administrative review of appeals from Department actions.

Furthermore, contrary to Petitioner's assertion, once the administrative appeal process is completed under § 8914 and §§ 105-107, a litigant has the right under Vermont's Administrative Procedure Act (APA), 3 V.S.A. § 801 *et seq.*, to appeal a contested case to the Vermont Supreme Court, 3 V.S.A. § 815(a). See App. 46a. In the case of *In re Kelscot, Ltd.*, 152 Vt. 579, 580-581, 568 A.2d 378, 379-80 (1989), the Vermont Supreme Court held that contested cases before Vermont administrative agencies, specifically the Department of Motor Vehicles, are subject to the appeal provisions of 3 V.S.A. § 815. And, in the event a full record has not developed in the original hearing, § 815(b) provides for augmentation of the record to include material evidence. *See* App. 46a.

In the instant case, Petitioner made attempts not to pay the tax required by 32 V.S.A. § 8903. In the end, he paid the use tax imposed in § 8903(b). *See* App. 49a. He never petitioned for a refund under § 8914 or requested a hearing. Even if he had, and the request was denied, Petitioner's available, immediate and adequate administrative remedy was a hearing pursuant to 23 V.S.A. §§ 105-107 and appellate review pursuant to 3 V.S.A. § 815. If Petitioner had petitioned for a refund

under § 8914, and if the Commissioner upheld the Department's imposition of the tax, thus denying the credit, the Petitioner had the right to appeal pursuant to the APA, 3 V.S.A. § 815. He failed to pursue that right in the first instance, however.

The ready availability of an adequate administrative review process and the right to appellate court review, including the ability to establish a record at the administrative tribunal level and to supplement that record at the appellate level, belie Petitioner's assertion that Vermont's administrative remedy denies him basic procedural due process.

CONCLUSION

For the reasons set forth above, the petition for a writ of certiorari should be denied, the same as the petition in *Williams v. State of Vermont*, Docket No. 90-1935, *cert. denied*, 60 U.S.L.W. 3219 (U.S. October 7, 1991).

Respectfully submitted,

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Attorneys for Respondents State of Vermont and William H. Conway, Jr., Commissioner, Vermont Department of Motor Vehicles

* Counsel of Record

APPENDIX

APPENDIX

STATE OF VERMONT

WASHINGTON COUNTY, ss.

WASHINGTON SUPERIOR COURT

Docket No. S-56-86 Wnc

VALERIE M. QUINN and JAMES L. WOODARD

v.

STATE OF VERMONT and WILLIAM H. CONWAY, JR.,
VERMONT COMMISSIONER OF MOTOR VEHICLES

SUMMONS

To the above-named Defendant(s):

You are hereby summoned and required to serve upon Paterson, Walke & Pratt, P.C., Plaintiffs' attorneys, whose address is 140 Main Street, P. O. Box 1310, Montpelier, Vermont 05602-1310, an answer to the Complaint which is herewith served upon you, within 20 days after service of this summons upon you, exclusive of the day of service*. If you fail to do so, judgment by default will be taken against you for the relief demanded in the complaint. Your answer must be filed with the Court. Unless the relief demanded in the complaint is for damage covered by a liability insurance policy under which the insurer has the right or obligation to conduct the defense, or unless otherwise provided in Rule 13(a), your answer must state as a counterclaim any related claim which you

may have against the plaintiff, or you will thereafter be barred from making such claim in any other action.

PATERSON, WALKE & PRATT, P.C.

By: /s/ Mary P. Kehoe
MARY P. KEHOE
Plaintiffs' Attorney

*Served on _____
Date

Dated February 5, 1986

_____
Deputy Sheriff

STATE OF VERMONT

WASHINGTON COUNTY, ss.

WASHINGTON SUPERIOR COURT

Docket No. S-56-86 Wnc

VALERIE M. QUINN and JAMES L. WOODARD,
Plaintiffs

v.

STATE OF VERMONT and WILLIAM H. CONWAY, JR.,
VERMONT COMMISSIONER OF MOTOR VEHICLES,
Defendants

COMPLAINT FOR DECLARATORY RELIEF

NOW COME Plaintiffs Valerie M. Quinn and James L. Woodard, by and through their attorneys, Paterson, Walke & Pratt, P.C., and complain of the Defendants and allege as follows:

Preliminary Statement

1. This action is brought by the Plaintiffs to prevent deprivation under the color of Vermont law of certain rights, privileges, and immunities secured to the Plaintiffs by the Constitutions of the United States and the State of Vermont. The action seeks a judgment ordering and declaring unconstitutional the Department of Motor Vehicle's (Department's) practice of denying tax credit to Vermont residents who register and pay tax on vehicles purchased outside the State of Vermont and then transfer registration to the State of Vermont, both in general and as applied to Plaintiffs on the particular facts of this case. Plaintiffs further seek a declaration that such Depart-

ment practice is in violation of 32 V.S.A. § 8911(9) and 3 V.S.A. § 846.

2. This action is brought pursuant to 42 U.S.C. §§ 1983 and 1988.

Parties

* * * *

4. Plaintiff James L. Woodard, is and always has been, a Vermont resident. Plaintiff Woodard thus qualifies as a Vermont resident for purposes of 32 V.S.A. § 8902(2) and 23 V.S.A. § 4(30).

5. Defendant William Conway, Jr. is the Commissioner of the Department of Motor Vehicles for the State of Vermont. Defendant Conway is authorized under 32 V.S.A. § 8901 to administer the Motor Vehicle Purchase and Use Tax imposed by 32 V.S.A. § 8903, and under 32 V.S.A. § 8909, has the authority to suspend an individual's right to operate a motor vehicle in the event such tax is not paid. Defendant Conway is also authorized under 32 V.S.A. § 8901 to "prescribe and publish regulations to carry into effect the provisions of the motor vehicle purchase and use tax".

Factual Allegations

* * * *

RELIEF

WHEREFORE Plaintiffs pray that judgment be entered:

1. Declaring that the Department's practice of denying Vermont residents the tax credit under § 8911(9), is void and unconstitutional insofar as the practice imposes a registration fee and license suspension penalty on Plaintiffs by reason of their status as Vermont residents who register their cars in outside states which tax and penalty would not be imposed on a Vermont resident who purchases his or her car under the same circumstances but does not register that car outside the state;

2. Ordering the Defendant Department of Motor Vehicles to refund the purchase and use tax of $241.00 paid by Plaintiff Quinn and the purchase and use tax of $588.00 paid by Plaintiff Woodard in this case; and

3. Granting Plaintiffs such other relief as the Court may deem meet and just, including costs and reasonable attorney's fees as authorized by 42 U.S.C. § 1988.

Dated at Montpelier, Vermont this 3rd day of February, 1986.

VALERIE M. QUINN and
JAMES L. WOODARD

By: PATERSON, WALKE & PRATT, P.C.,
Their Attorneys

By: /s/ Mary P. Kehoe
MARY P. KEHOE

By: /s/ Jonathan Chase
JONATHAN CHASE
Co-Counsel

STATE OF VERMONT

COUNTY OF WASHINGTON

WASHINGTON SUPERIOR COURT

Docket No. S-56-86-Wnc

VALERIE M. QUINN and JAMES L. WOODARD,
Plaintiffs

v.

STATE OF VERMONT and WILLIAM H. CONWAY, JR.,
VERMONT COMMISSIONER OF MOTOR VEHICLES,
Defendants

ACCEPTANCE OF SERVICE

I, BRIAN BURGESS, Deputy Attorney General for the State of Vermont, do hereby accept service of the Summons and Complaint on behalf of the State of Vermont in the above-entitled matter, and hereby waive any and all other manner of service whatsoever.

Dated at Montpelier, Vermont, this 10th day of February, 1986.

/s/ Brian Burgess
BRIAN BURGESS
Deputy Attorney General

STATE OF VERMONT

WASHINGTON COUNTY, ss.

WASHINGTON SUPERIOR COURT

Docket No. S436-82WnC

NORMAN WILLIAMS

v.

STATE OF VERMONT and WILLIAM H. CONWAY, JR., *et al.*

MOTION TO DISMISS

NOW COMES the State of Vermont and William H. Conway, Jr., et al., and by and through Assistant Attorney General Andrew M. Eschen hereby moves this Honorable Court pursuant to V.R.C.P. 12(b)(6) to dismiss the above captioned matter for the following reasons:

(1) Plaintiff lacks standing.

(2) The Complaint fails to state a claim upon which relief can be granted.

In support hereof, Defendant respectfully submits his Memorandum of Law, attached hereto and incorporated herein by reference.

Dated at Montpelier, Vermont this 22 day of December, 1982.

JOHN J. EASTON, JR.
Attorney General

By: /s/ Andrew M. Eschen
ANDREW M. ESCHEN
Assistant Attorney General

STATE OF VERMONT

WASHINGTON COUNTY, ss.

WASHINGTON SUPERIOR COURT

Docket No. S56-86 WnC

VALERIE M. QUINN and JAMES L. WOODARD,
Plaintiffs

v.

STATE OF VERMONT and WILLIAM H. CONWAY, JR.,
VERMONT COMMISSIONER OF MOTOR VEHICLES,
Defendants

ORDER DESIGNATING COMPLEX ACTION

This matter came before the undersigned Superior Judge on the Motion of Plaintiffs Valerie Quinn and James L. Woodard dated February 21, 1986 for an Order designating this case a complex action pursuant to V.R.C.P. 16.1. Based upon the pleadings and review of the file, the Court finds as follows:

1. The legal issues presented by this case are unusually complicated;

2. Additionally, the just and efficient administration of this action will be promoted by designation as a complex action, as is demonstrated by the fact that a similar case of equal constitutional import, *Williams v. State of Vermont, et al.*, Docket No. S436-82 WnC, was also designated as a complex action.

This Court is aware that the *Williams* case raises issues similar to those presented in this case and is equally

aware of the gravity of the issues raised and the consequences which may result from the disposition of this matter. Given these circumstances, it is necessary that one Judge become familiar with this entire matter and remain assigned to the case to its completion in the trial court.

The undersigned would be willing to be designated to this case.

Dated at Montpelier, Vermont this 25th day of Feb., 1986.

/s/ James L. Morse
JAMES L. MORSE
Superior Judge

The Chief Administrative Judge for trial courts hereby approves the designation of the above-captioned matter as a complex action pursuant to V.R.C.P. 16.1 and designates James L. Morse, Superior Judge to sit as Presiding Judge in this complex action, which is consolidated with *Williams v. Vermont, supra.*

/s/ Stephen B. Martin
STEPHEN B. MARTIN
Chief Administrative Judge

STATE OF VERMONT

WASHINGTON COUNTY, ss

WASHINGTON SUPERIOR COURT

Docket No. S-56-86 WnC

VALERIE M. QUINN and JAMES WOODARD

v.

STATE OF VERMONT, WILLIAM H. CONWAY, JR., COMMR. OF MOTOR VEHICLES

LIST OF DOCUMENTS

1. Summons and Complaint for Declaratory Relief.
2. Acceptance of Service.
3. Letter regarding parties agreement to extend time in which Answer (or Motion to Dismiss) can be filed.
4. Motion To Designate Case As A Complex Action.
5. Order Designating Complex Action.
6. Motion to Dismiss and Memorandum of Law.
7. Supplemental Memorandum of Law in Support of Motion to Dismiss.
8. Memorandum of Law in Opposition to Defendants' Motion to Dismiss.
9. Reply to Plaintiffs' Memorandum of Law in Opposition to Motion to Dismiss.
10. Motion to Withdraw.

11. Plaintiffs' Notice of Deposition of Susan Crampton.

12. Motion to Quash and/or Motion for Protective Order, and Memorandum of Law.

13. Plaintiffs' Motion for Extension of Time in Which to Conduct Discovery.

14. Memorandum in Opposition for Extension of Time in Which to Conduct Discovery.

15. Copy of Order of Recusal (for original see S-436-82 WnC).

16. Copy of Motion for Expedited Ruling on Defendant's Motion to Dismiss for Failure to State a Claim Upon Which Relief can be Granted Due to Defendant's Sovereign Immunity and to Preclude Further Discovery.

17. Plaintiffs' Demand for Jury Trial of Right.

18. Memorandum of Law in Reply to Plaintiffs' Demand for Jury Trial.

19. Plaintiffs' Motion to Compel Production of Governmental Memoranda.

20. Defendant's Supplemental Memorandum of Law.

21. Plaintiff's Motion for Extension of Time to File Motion for Summary Judgment.

22. Motion for Summary Judgment and Memorandum of Law in Support of Plaintiff Woodard's Motion for Summary Judgment.

23. Reply to Plaintiff Woodard's Motion for Summary Judgment.

24. Affidavit in support of Plaintiff Woodard's Motion for Summary Judgment.

25. Memorandum of Decision.

26. Entry Order granting Motion for Extension of Time to File Motion for Summary Judgment.

27. Entry Order granting Motion for Summary Judgment.

28. Opinion and Order.

29. NOTICE OF APPEAL and Notice of Appearance.

Dated at Montpelier, County of Washington, this 13th day of January, 1989.

/s/ Sandra Holt
SANDRA S. HOLT
Deputy Clerk

cc: Mary P. Kehoe, Esq.
Andrew M. Eschen, Ass't. A.G.

STATE OF VERMONT

WASHINGTON COUNTY, SS.

WASHINGTON SUPERIOR COURT

Docket No. S-56-86WnC

VALERIE M. QUINN and JAMES WOODARD

v.

STATE OF VERMONT

OPINION AND ORDER

[Filed Nov. 2, 1988]

This action is consolidated with *Williams v. State*, S-436-82WnC. In both *Williams* and *Quinn*, the plaintiffs challenge the constitutionality of Vermont's motor vehicle purchase and use tax, 32 V.S.A. sections 8903 and 8911. In each case, the defendant filed a motion to dismiss, which was denied. In each case, the defendant then filed a motion asking this court to reconsider its decision. In *Williams*, this court issued an order granting the defendant's motion and dismissing the complaint. *OPINION AND ORDER* (May 3, 1988).

To the extent that the *Quinn* plaintiffs raise an equal protection claim, this case is largely controlled by the court's reasoning in *Williams*. However, to the extent that this case is factually different from *Williams* and raises additional claims, some further analysis is required.

In *Williams*, the plaintiffs argued that the Vermont motor vehicle purchase and use tax unconstitutionally dis-

criminates between residents and nonresidents. Specifically, they alleged that nonresidents who registered their motor vehicles in Vermont, after registering the same vehicles out of state, would have to pay the tax, while Vermont residents who did the same would not have to pay the tax. In its May 3rd order in *Williams*, this court held that, by adopting an agency rule clearly stating that neither residents nor nonresidents who register their vehicles out of state could benefit from a section 8911(9) exemption, the Department of Motor Vehicles ("DMV") had eliminated the possibility of an equal protection challenge to the tax by nonresidents.

The *Quinn* case represents a slightly different equal protection challenge. Here the plaintiffs are Vermont residents who, after purchasing and registering vehicles out of state, returned to Vermont and, upon registering their vehicles here, were forced to pay the tax. They challenge the motor vehicle purchase and use tax statute on equal protection grounds, arguing that it impermissibly discriminates between two groups of Vermonters—those who first register their vehicles out of state before registering them here and those who register their vehicles only once, in Vermont. Only the former group of Vermonters—those in the plaintiffs' position—must pay the tax.

The plaintiffs' argument fails because a rational basis exists for the distinction between the two classes of Vermonters. Anyone who registers a vehicle in two states (another state and then Vermont) must pay two taxes, regardless of whether the vehicle owner is a resident or nonresident, because in either case the owner will derive benefits from using the highways of two states. This is in fact what plaintiff Quinn alleges she did: she purchased a car in Arizona while attending school there. She used the car in Arizona for fourteen months before returning to live in Vermont. She then registered the car—and presumably used it—here. She paid two taxes

to two states because she benefitted from two states' highways.

Plaintiff Woodard's case is somewhat different. He alleges that he purchase a car in Florida, registered it there, and then drove it to Vermont where he sought to register it. The pleadings do not reveal how long Woodard had the car in Florida or why he registered his vehicle in Florida if he did not intend to remain there. Perhaps he did not want to wait for a Vermont registration to be processed before he drove the car. In any case, Woodard's choices concerning registration of his car do not negate the purpose behind the Vermont tax or successfully challenge the tax on equal protection grounds. Woodard could have avoided double taxation by buying his car in Vermont or registering his new car here instead of in Florida. Further, Woodard cannot assert that he has not benefitted from using his car in Vermont. If Florida received Woodard's tax without giving him any benefit, that inequity cannot be attributed to Vermont's tax scheme. The plaintiffs' equal protection argument fails, and therefore they are not entitled to a tax refund.

The plaintiffs additionally raise a federal due process claim. However, when economic regulations rather than fundamental rights are at issue, the test for violations of substantive due process is the same as that for violations of equal protection, that is,

> whether the laws are rationally related to a legitimate state interest (citation omitted), though the focus of substantive due process analysis is not whether the [s]tate has treated similarly situated classes differently but whether its interest in burdening a *single* class outweighs the due process interest of that class.

Dieffenbach v. Attorney General, 604 F.2d 187, 195 (2d Cir. 1979).

The plaintiffs cannot meet this test. Vermont's motor vehicle purchase and use tax does not burden a single class: everyone who registers a vehicle in the state must pay something to finance its highways. A tax scheme that lets some residents avoid Vermont tax merely by registering vehicles out of state before bringing them back to Vermont would be unfair to other Vermont residents who purchase and register vehicles here. Section 8911(9), while not a perfect tax scheme, does not single out the plaintiffs for special treatment.

The plaintiffs bring additional claims under articles 1, 2, 4, and 9 of chapter I of the Vermont constitution.

Article 9, the so-called proportional contribution or uniformity clause has been construed to be the practical equivalent of the equal protection clause of the federal constitution. *Pabst v. Commissioner of Taxes*, 136 Vt. 136, 131 n.2 (1978). Insofar as this court finds that the motor vehicle purchase and use tax does not violate federal equal protection, it also finds the tax does not violate article 9.

Article 1 protects the right to acquire and protect property. However, the Vermont Supreme Court has held that this right is specifically subject to the "legislative restraint of taxation." *State v. Harrington*, 68 Vt. 622, 629 (1896). Thus, Article 1 provides no independent basis for the plaintiffs' action.

Article 2 provides that when private property is taken for public use, "the owned ought to receive an equivalent in money." Nothing in the prior case law construing this article implies that taxation is a taking. In any case, taxation is not an uncompensated taking. When the state collects the motor vehicle purchase and use tax, it gives taxpayers a corresponding benefit—the use of state highways. Article 2 does not give the plaintiffs a cause of action.

Article 4 provides that citizens are entitled to legal remedies for all injuries to their person or property. If the Vermont motor vehicle purchase and use tax is upheld on equal protection, due process, and other substantive constitutional grounds, the plaintiffs cannot show an injury, and they are not therefore entitled to a remedy. Article 4 does not apply until a wrong has been established.

Finally, the plaintiffs allege that DMV's practice of denying tax credits to Vermonters who register their vehicles out of state before registering them in Vermont violates the Administrative Procedures Act ("APA"), 3 V.S.A. section 801, *et seq.*, because DMV acted without first promulgating a valid administrative rule.

The plaintiffs' case was filed in February 1986. In July 1986, DMV did promulgate a rule to clarify its reading of 32 V.S.A. section 8911(9). The plaintiffs apparently do not challenge the validity of that rule. Rather, the issues appear to be (1) whether before making a rule explicating section 8911(9), DMV could administer that statute, and specifically whether it could deny the plaintiffs tax credits; and (2) whether because DMV at one point began the rulemaking process, it was obligated to complete that process before administering the statute.

Section 8901 of Title 32 states that the

> commissioner [of motor vehicles] may prescribe and publish regulations to carry into effect the provisions of this chapter, which regulations, when reasonably designed to carry out the intent of this chapter, shall have the same force as if enacted herein.

This section gives the commissioner authority to make regulations. The section has permissive language ("the commissioner *may* prescribe regulations") and does not manifest a legislative intent to require the commissioner to make regulations. Thus, the commissioner was free

to effectuate section 8911(9) without rulemaking. Moreover, under Vermont case law, even if the commissioner was *required* to adopt regulations, he or she could still administer the tax from the time the tax legislation went into effect. *See Union Twist Drill Co. v. Harvey*, 113 Vt. 493, 503 (1944).

Under 3 V.S.A. section 831(a) of the APA, an agency that opts for rulemaking is required to follow the procedures outlined therein. However, nothing in the section 831(a) or any other section of the APA prohibits the commissioner from administering legislation without rulemaking where the legislation (in this case, section 8901) so permits. Even if the commissioner initiated and then terminated or suspended an APA rulemaking regarding a particular statute, his or her ability to administer that statute is not effected. DMV's application of section 8911(9) to the plaintiffs was appropriate, and they have no claim for relief.

Based on the foregoing, the defendant's motion for reconsideration is GRANTED. On reconsideration, the defendant's motion to dismiss is GRANTED, and the plaintiffs' complaint is DISMISSED.

Dated at Montpelier, Vermont this 2nd day of Nov., 1988.

/s/ Alden T. Bryan
ALDEN T. BRYAN
Superior Court Judge

/s/ Patricia B. Jensen
PATRICIA B. JENSEN
Assistant Judge

/s/ Paul H. Guare
PAUL H. GUARE
Assistant Judge

STATE OF VERMONT

WASHINGTON COUNTY, ss.

WASHINGTON SUPERIOR COURT

Docket No. S-436-82 Wnc

NORMAN WILLIAMS and SUSAN LEVINE,
Plaintiffs

v.

STATE OF VERMONT and WILLIAM H. CONWAY, JR.,
VERMONT COMMISSIONER OF MOTOR VEHICLES,
Defendants

ANSWER

NOW COME the State of Vermont and William H. Conway, Jr., Commissioner of Motor Vehicles, by and through their attorney, Assistant Attorney General Andrew M. Eschen, and answer the Amended Complaint as follows:

AFFIRMATIVE DEFENSES

1. The complaint fails to state a claim upon which relief can be granted.
2. statue of limitations
3. laches
4. waiver
5. estoppel
6. unclean hands
7. mootness
8. sovereign immunity

9. The Vermont motor vehicles purchase and use tax, 32 V.S.A. § 8902 *et seq.* is not unconstitutional on its face.

   In the alternative, if it is unconstitutional on its face, the tax is, and has been, administered in a nondiscriminatory fashion and is, in actuality of operation, constitutional.

WHEREFORE, defendants demand that this action be dismissed, and that they be awarded their costs and reasonable attorney's fees.

DATED AT Montpelier, Vermont, this 12th day of September, 1985.

STATE OF VERMONT

JEFFREY L. AMESTOY
Attorney General

By: /s/ Andrew M. Eschen
ANDREW M. ESCHEN
Assistant Attorney General

STATE OF VERMONT
WASHINGTON COUNTY, SS

WASHINGTON SUPERIOR COURT

Docket No. S-436-82 Wnc

NORMAN WILLIAMS and
SUSAN LAVINE (sic)

vs.

STATE OF VERMONT and
WILLIAM H. CONWAY, JR.

SUPPLEMENTAL LIST OF DOCUMENTS

See Attached Lists of Documents 1 through 15 and 16 through 29

30. Certified copy of Opinion from the Supreme Court of the United States.

31. Copy of letter from Atty. Eschen to Attorney Williams re U.S. Supreme Court's Order to pay $945.80 for costs in this action.

32. Copy of Entry Order from the VT Supreme Court: "Counsel shall show cause by August 2, 1985, why this matter should not be remanded to the trial court for further proceedings in consonance with the decision of the Supreme Court of the United States."

33. Memorandum of Law in Response to Show Cause Order.

34. Memorandum in Reply to Appellees' Memorandum Dated July 29, 1985.

35. Copy of Entry Order from the VT Supreme Court: "Upon consideration of the memorandum of counsel, together with the opinion of the United States Supreme Court, it is hereby ordered that this matter is remanded to the Washington Superior Court for further proceedings not inconsistent with the opinion of the United States Supreme Court."

36. Answer.

37. Defendant's First Set of Interrogatories.

38. Plaintiffs' Answers to Interrogatories.

39. Plaintiffs' Answers to Interrogatories.

40. Certified copies of Entry Orders (2) from the VT Supreme Court (See #32 and #35).

41. Plaintiffs' Request for Production of Documents and Interrogatories [First Set].

42. Discovery Certificate re Answers to Plaintiffs' First Set of Requests for Production and Interrogatories.

43. Order.

44. Order--designating cause as a complex action and appointing The Honorable James L. Morse trial judge for the proceedings.

45. Defendants' Requests to Admit.

46. Defendants' Second Set of Interrogatories to Plaintiff Levine.

47. Certificate of Service re Responses to Defendants' Second Set of Interrogatories to Levine and to Defendants' Requests to Admit.

48. Copy of letter from Attorney Eschen to Reporter DeSerres re Deposition of Commissioner Conway.

49. Motion to Dismiss and in the Alternative, Motion for Summary Judgment and Memorandum of Law in Support of Motion to Dismiss for Failure to State a Claim Upon Which Relief Can be Granted, and in the Alternative, Motion for Summary Judgment.
50. Answer to Requests to Admit.
51. Answers to Plaintiffs' Second Set of Interrogatories and Requests to Produce.
52. Copy of Supplemental Memorandum of Law in Support of Motion to Dismiss (original is located in S-56-86 Wnc., Quinn, et al v. State of VT, et al).
53. Memorandum of Law in Opposition to Defendants' Motion for Summary Judgment.
54. Copies of three (3) Vermont cases submited by Attorney Williams as additional support for Plaintiffs' Memorandum in Opposition to Summary Judgment (by letter dated 3/26/86).
55. Letter filed by Attorney Eschen in response to Attorney Williams' letter dated 3/26/86).
56. Motion to Quash, Memorandum of Law and Affidavit of William H. Conway, Jr.
57. Notice of Deposition Duces Tecum to Thomas McCormick.
58. Notice of Deposition Duces Tecum to George Paquette.
59. Notice of Deposition Duces Tecum to Mary Smith.
60. Notice of Deposition Duces Tecum to Mary LeBlanc.
61. Notice of Deposition Duces Tecum to Mary Ashcroft.
62. Notice of Deposition Duces Tecum to Gordon Currier.
63. Notice of Deposition Duces Tecum to Dean Martin.

64. Notice of Deposition Duces Tecum to Barbara Rugeau.

65. Notice of Depositon Duces Tecum to Wayne Sullivan.

66. Motion for Protective Order, Objection to Notice of Deposition Duces Tecum, and Motion to Quash Subpoenas, with Memorandum of Law.

67. Request for Supplementation.

68. Supplementation to Defendants' Response to Plaintiffs' First Set of Requests for Production and Interrogatories.

69. Notice of Appearance of Manchester & O'Neill, P.C. for Plaintiffs.

70. Order re Defendants' Motion for Protective Order, Objection to Deposition Duces Tecum, and Motion to Quash Subpoenas.

71. Plaintiffs' Motion to Compel Defendant William H. Conway, Jr. to File Sworn Answers to Plaintiffs' First and Second Set of Requests for Production and Interrogatories.

72. Plaintiffs' Motion to Compel Complete Answers of Plaintiffs' First Set of Requests for Production and Interrogatories.

73. Plaintiffs' Motion to Compel Defendant State of Vermont to Answer Plaintiffs' First Set of Requests for Production and Interrogatories & Memorandum of Points and Authorities.

74. Plaintiffs' Third Interrogatories and Requests to Produce.

75. Memorandum of Law in Opposition to Plaintiffs' Motion to Compel Defendant State of Vermont to Answer Plaintiffs' First Set of Requests for Produc-

tion and Interrogatories & Memorandum of Points and Authorities.

76. Memorandum of Law in Opposition to Plaintiffs' Motion to Compel Complete Answers to Plaintiffs' First Set of Requests for Production & Interrogatories.

77. Defendants' Motion to Compel Plaintiff Norman Williams to File Sworn Answers to Defendants' First Set of Interrogatories.

78. Plaintiffs' Answers to Interrogatories.

79. Plaintiffs' Supplemental Memorandum in Support of Their Motion to Compel Complete Answers to Plaintiffs' First Set of Requests for Production and Interrogatories.

80. Plaintiffs' Supplemental Memorandum in Support of Their Motion to Compel Defendant State of Vermont to Answer Plaintiffs' First Interrogatories and Request to Produce.

81. Plaintiffs' Notice of Deposition Pursuant to Rule 30(b)(5), (6) of the Vermont Rules of Civil Procedure.

82. Plaintiffs' Notice of Deposition Duces Tecum.

83. Defendants' Third Set of Interrogatories and Request to Produce.

84. Defendants' Request to Admit (Second Set).

85. Defendants' Request to Admit (Second Set).

86. Order re discovery motions.

87. Plaintiffs' Discovery Certificate re Plaintiff Norman Williams' Response to Defendants' Request to Admit (Second Set) and Plaintiff Susan Levine's Response to Defendants' Request to Admit (Second Set).

88. Reply to Plaintiffs' Memorandum of Law in Opposition to Defendants' Motion for Summary Judgment.

89. Plaintiffs' Motion to Further Extend Discovery and Memorandum of Points and Authorities.

90. Plaintiffs' Notice of Deposition Duces Tecum of Susan Crampton.

91. Plaintiffs' Notice of Deposition Duces Tecum of William Conway.

92. Plaintiffs' Second Notice of Deposition Duces Tecum.

93. Plaintiffs' Motion to Compel Defendants to Answer Plaintiffs' Third Interrogatories and Requests to Produce.

94. Consolidated Motion for Protective Order and Sanctions and Consolidated Memorandum of Law in Support of Motion for Protective Order, in Opposition to Plaintiffs' Motion to Further Extend Discovery, and in Support of Sanctions.

95. Plaintiffs' Answers to Defendants' Third Set of Interrogatories and Requests to Produce.

96. Defendants' Motion to Compel Plaintiffs to Answer Third Set of Interrogatories, and Requests to Produce, with Memorandum of Law.

97. Plaintiffs' Amended Notice of Deposition Duces Tecum of Laura Parker.

98. Plaintiffs' Fourth Set of Interrogatories.

99. Motion to File Interrogatories and to Shorten Time for Response.

100. Plaintiffs' Notice of Deposition of Defendant William H. Conway, Jr.

101. Memorandum of Law in Support of Motion for Protective Order and/or Motion to Quash.

102. Plaintiffs' Notice of Deposition of Susan Crampton.

103. Motion to Compel Deposition Testimony and Plaintiffs' Memorandum of Law in Support of Motion to Compel Deposition Testimony.

104. Motion for Protective Order and/or Motion to Quash (Memo is #101).

105. Motion to Compel and Memorandum of Law in Support of Motion to Compel.

106. Motion for Protective Order and/or Motion to Quash, with Memorandum of Law.

107. Motion to Shorten Time for Notice of Deposition or to Extend Discovery Schedule and Notice of Deposition Duces Tecum to Clyde Cassidy.

108. Memorandum in Opposition to Plaintiffs' Motion to File Interrogatories and to Shorten Time for Response.

109. Plaintiffs' Memorandum of Law in Opposition to Motions to Quash Depositions of William Conway and Susan Crampton.

110. Plaintiffs' Motion to Recuse the Honorable James L. Morse and Memorandum of Points and Authorities.

111. Motion for Protective Order and/or Motion to Quash, with Memorandum of Law.

112. Reply to Plaintiffs' Motion to Compel Deposition Testimony.

113. Plaintiffs' Motion to Enlarge the Period of Time for the Completion of Discovery and Memorandum of Points and Authorities.

114. Motion to Compel Production of Documents.

115. Response to Defendants' Motion to Compel Dated December 3, 1986.

116. Memorandum of Law in Support of Motion to Compel Production of Governmental Memorandum Dated September 4, 1985, September 12, 1985 and November 27, 1985.

117. Defendants' Memorandum in Opposition to Plaintiffs' Motion to recuse the Honorable James L. Morse, and in Reply to Plaintiffs' Memorandum of Law in Opposition to Motions to Quash Depositions of William Conway and Susan Crampton.

118. Plaintiffs' Memorandum of Law in Response to Defendants' Opposition to Fourth Set of Interrogatories.

119. Plaintiffs' Memorandum of Law in Opposition to Motion to Quash Deposition of Clyde Cassidy.

120. Plaintiffs' Response to Defendants' Reply to Motion to Compel Deposition Testimony.

121. Reply to Plaintiffs' Motion to Compel Production of Documents and Affidavit of John Dooley.

122. Order of Recusal.

123. Motion for Expedited Ruling on Defendants' Motion to Dismiss for Failure to State a Claim Upon Which Relief can be Granted Due to Defendants' Sovereign Immunity and to Preclude Further Discovery and Memorandum of Law in Support of Motion for Expedited Ruling on Defendants' Motion to Dismiss for Failure ot State a Claim Upon Which Relief Can be Granted Due to Defendants' Sovereign Immunity, and to Preclude Further Discovery.

124. Letter from Attorney Williams to Attorney Eschen dated 12/22/86, letter from Attorney Eschen to Attorney Williams dated 1/22/87, and Affidavit of Roy Williams filed in connection with Plaintiffs' Motion to File [Fourth Set Of] Interrogatories and

to Shorten Time for Response, and the Defendants' Memorandum in Opposition thereto.

125. Memorandum of Law in Opposition to Defendants' Motion to Dismiss Dated January 12, 1987.

126. Letter from Administrative Judge for Trial Courts to counsel of record advising he will consider a request to have the matters designated a complex action when the presiding judge in either Washington Superior Court or Chittenden Superior Court makes such a request under V.R.C.P. 16.1.

127. Letter from Reporter Leclerc to Attorney O'Neill re Deposition of Harold R. Cone (copy).

128. Letter from Reporter Leclerc to Attorney O'Neill re Depositions of Lois Theriault and Lois Hebert (copy).

129. Designation of actions as complex under V.R.C.P. § 16.1 and assignment of Judge Alden T. Bryan until further order of the Administrative Judge.

130. Reply to Plaintiffs' Memorandum of Law in Opposition to Defendants' Motion to Dismiss Dated January 12, 1987.

131. Plaintiffs' Motion to File Fifth Set of Interrogatories and Requests to Produce.

132. Reply to Plaintiffs' Motion to File Fifth Set of Interrogatories and Requests to Produce.

133. Plaintiffs' Reply Memorandum in Opposition to Motion to Dismiss.

134. Defendants' Response to Plaintiffs' Reply Memorandum in Opposition to Motion to Dismiss (February 27, 1987).

135. Plaintiffs' Supplemental Memorandum of Law in Opposition to Motion to Dismiss.

136. Copy of Defendants' Supplemental Memorandum of Law (original is in Docket No. S-56-86 Wnc, Quinn v. State of VT).

137. Plaintiffs' Reply to Defendants' Supplemental Memorandum of Law.

138. Copy of Defendants' Response to Plaintiffs' Reply Memorandum (Dated April 6, 1987).

139. Copy of recent Second Circuit Opinion by Judge Oakes in *McClary v. O'Hare*, 786 F.2d 83 (2d Cir-1986) (New York), letter from Attorney O'Neill dated 4/15/87).

140. Letter from Attorney Eschen in response to Attorney O'Neill's letter dated 4/15/87.

141. Defendants' Response to Plaintiffs' Reply Memodandum (Dated April 6, 1987).

142. Memorandum of Decision.

143. Motion for Clarification and/or Reconsideration of May 6, 1987 Order Denying Motion to Dismiss, and in the Alternative, Motion for Interlocutory Appeal, with Memorandum of Law, and Memorandum of Law in Supoprt of Motion for Interlocutory Appeal.

144. Plaintiffs' Memorandum of Law in Opposition to Interlocutory Appeal.

145. Reply to Plaintiffs' Memorandum of Law in Opposition to Interlocutory Appeal.

146. Response to Plaintiffs' Reply Memorandum in Opposition to Motion for Reconsideration or Interlocutory Appeal.

147. Plaintiffs' Reply Memorandum in Opposition to Motion for Reconsideration or Interlocutory Appeal.

148. Plaintiffs' Reply Memorandum in Opposition to Motion to Appeal.

149. Letter from Attorney O'Neill to Judge Bryan re status of case, dated 11/9/87.

150. Letter from Attorney Eschen to Judge Bryan in response to Attorney O'Neill's letter dated 11/9/87.

151. Defendants' Response to Plaintiffs' Reply Memorandum in Opposition to Motion to Appeal.

152. Copy of recent decision by the VT Supreme Court on interlocutory appeals in the case of State *v. McCann*; copy of decision and article appearing at 80 A.L.R. 2d 1035 and 80 A.L.R. 2d 1040, concerning refunds of state taxes paid under protect or under compulsion; and copy of recent decision by Magistrate Niedermeier on the scope of attorney-client privilege and executive privilege in *Melson v. Bristow*, submitted by Attorney Williams.

153. Reply to Norman Williams' Letter of January 5, 1988.

154. Plaintiffs' Motion for Preservation and Immediate Discovery of Defendants' Motor Vehicle Computer Records.

155. Reply to Plaintiffs' Motion for Preservation and Immediate Discovery of Defendants' Motor Vehicle Computer Records.

156. Opinion and Order.

157. NOTICE OF APPEAL dated May 16, 1988 and filed May 17, 1988.

158. Index of Cases and copies of miscellaneous cases.

DATED at Montpelier, County of Washington and State of Vermont this 10th day of June, 1988.

/s/ Barbara B. Perojo
BARBARA B. PEROJO
Deputy Clerk

STATE OF VERMONT

WASHINGTON COUNTY, ss

WASHINGTON SUPERIOR COURT

Docket No. S-436-82 WnC

NORMAN WILLIAMS and SUSAN LEVINE

vs.

STATE OF VERMONT and WILLIAM H. CONWAY, JR.,
VERMONT COMMISSIONER OF MOTOR VEHICLES

OPINION AND ORDER

Filed May 3 '88

This case is currently before the court on the defendants' motion asking the court to clarify or reconsider its May 5, 1987, order denying the defendants' motion to dismiss this action for failure to state a claim. The defendants assert that three issues have been left either completely or partially unanswered by the court's order: (1) whether the defendant William Conway, is being sued in his personal as well as his official capacity; (2) whether sovereign immunity bars the plaintiffs from receiving any or all of the relief requested in their complaint; and (3) whether events occurring after this case returned from the United States Supreme Court have rendered the action partially or completely moot or have deprived the plaintiffs of standing as to any part of all of this action.

The court's May 6, 1987, order dealt only with the first and second issues. This opinion will begin by addressing the third issue and then will clarify and amend the court's position on the first and second issues.

This case began in November 1982. The plaintiffs brought an action under 42 U.S.C. sections 1983 and 1988 challenging the constitutionality of Vermont's motor vehicle purchase and use tax, 32 V.S.A. sections 8903 and 8911. Under the taxing scheme embodied in these statutes, the plaintiffs, who had moved to Vermont from other states, were forced when registering their motor vehicles to pay a purchase and use tax on the fair market value of those vehicles, which had been purchased, taxed, and registered in their prior states of residence. Under the same taxing scheme, Vermont residents acquiring motor vehicles in another state and paying sales or use tax in the other state receive a credit toward the Vermont tax as long as the other state provides reciprocal privileges to those who pay Vermont tax. In their complaint, the plaintiffs contend that Vermont's motor vehicle purchase and use tax treats residents differently than nonresidents—specifically that only residents can qualify for credits for sales or use tax paid out of state—and that such disparate treatment offends various provisions of the state and federal constitutions, including the equal protection, privileges and immunities, and commerce clauses.

In December 1982, shortly after the inception of this action, the defendants filed a motion to dismiss for failure to state a claim. In response to that motion, this court (Morse, J.) issued an opinion holding the purchase and use tax constitutional and dismissing the plaintiffs' complaint. OPINION AND ORDER (February 24, 1983). The plaintiffs appealed that decision to the Vermont Supreme Court.

The Vermont Supreme Court affirmed this court's decision by reference to another decision it issued the

same day. *Williams v. State*, 144 Vt. 649, 650 (1985) (citing *Leverson v. Conway*, 144 Vt. 523 (1984)). In *Leverson*, the Vermont Supreme Court, acknowledging that the purchase and use tax did create classification that treated some motor vehicle owners differently than others, nonetheless upheld the tax. Under an equal protection analysis, the *Leverson* court found the classification scheme created by the purchase and use tax is rationally related to a legitimate state purpose, namely, that those who use Vermont's state highways must contribute to their maintenance and improvement. *Id.* at 532-33. The court further found that the privileges and immunities clause, *id.* at 534, and commerce clause, *id.*, at 535-36, do not apply to this taxing scheme.

The plaintiffs then took an appeal to the United States Supreme Court, which reversed the decision and remanded the case to the Vermont Supreme Court. *Williams v. Vermont*, 472 U.S. 14 (1985). The Vermont Supreme Court in turn remanded the case to this court.

Since arriving back in this court, this case has been designated as a complex action. The designated judge has recused, and a new judge has been assigned. The parties have deluged the court with discovery motions; numerous hearings and conferences have occurred. A case that came back from the United States Supreme Court as one thick but manageable file has now quadrupled in size. In the course of accumulating paper and changing judges—as well as two years on appeal and two additional years in this court before the May 6, 1987, order—some continuity and focus has undoubtedly been lost.

The defendants' motion to clarify or reconsider has given this court an opportunity to go back and reexamine where this case stands. Beginning with the defendants' February 17, 1986, motion to dismiss, the parties have filed in excess of twenty legal memoranda on the issues

discussed in this court's May 6, 1987, opinion. This court cannot and will not endeavor to address every argument and subargument or to analyze every case put forward by the parties. The court has considered every argument and examined every case so raised, but this opinion will explicitly treat only that material most directly relevant to the disposition of the issues now before the court.

First, what did the United States Supreme Court decide in *Williams* and what remains for this court to do?

In *Williams*, the United States Supreme Court held that "when the [motor vehicle purchase and use tax] statute is viewed *on its face*, [the plaintiffs] have stated a claim of unconstitutional discrimination." *Id.* at 28 (emphasis added). In reaching its decision, the Court emphasized the narrowness of its holding. *Id.* at 27. The Court did not hold the statute unconstitutional. Rather, because the case came before the Court in the form of a dismissal of an unanswered complaint, the only decision it could render was whether, on any facts, a trial court could find merit in the plaintiffs' claim. Without a factual record, the Court was unable to say that, purely on its face, the statute was constitutional—or more precisely, that the statute was not unconstitutional. However, the Court found it "conceivable that, were a full record developed, it would turn out that in practice the statute does not operate in a discriminatory fashion." *Id.* at 28. Further, the Court expressed no opinion as to any appropriate remedy, "given the possible relevance of state law," *id.*, thus anticipating that the state might have a sovereign immunity defense.

The *Williams* Court was particularly concerned with the constitutionality in practice of one of the statutory exemptions from the motor vehicle purchase and use tax. Section 8911(9) of Title 32 provides an exemption from the purchase and use tax for

> pleasure cars acquired outside the state by a resident of Vermont on which a state sales or use tax has been paid by the person applying for a registration in Vermont, providing that the state or province collecting such tax would grant the same pro-rata credit for Vermont tax paid under similar circumstances. If the tax paid in another state is less than the Vermont tax, the tax due shall be the difference.

The Court thought it possible that under this exemption a Vermont resident who purchased a car, paid sales tax on it, and registered it in another state would receive a credit toward Vermont's use tax whereas a nonresident in the plaintiffs' position would not receive a similar credit.

The defendants asserted in the United States Supreme Court that this interpretation did not in fact reflect how the statute operated. They stated that the exemption applied only to Vermonters who bought cars out of state and registered them in state without first registering them elsewhere. *Id.* at 19. In its decision, the Court explicitly conceded that defendants' interpretation of the statute would negate the plaintiffs' claim. *Id.* ("The State's submission, if it is to be accepted, would negate any claim that appellants were treated differently than Vermont residents in similar circumstances.") The Court further stated that, even under the defendants' interpretation of the section 8911(9) exemption, the statute might theoretically operate in a discriminatory fashion but that the plaintiffs would not be the victims of this discrimination and therefore could not properly raise it. *Id.* at 19 n.4.

The entire equal protection analysis in *Williams* is predicated upon the validity of the Court's conditional interpretation of the section 8911(9) exemption. The *Williams* Court asserted that this interpretation was supported by the Vermont Supreme Court's decision in *Leverson*, not because the *Leverson* Court had announced

this interpretation, but because it had failed to negate this interpretation. In effect, the Vermont Supreme Court's failure to erase this one ambiguity left the door open for the plaintiffs to pursue their claim.

The *Williams* dissenters point out that because the majority's concern was that on its face the purchase and use tax exemption, 32 V.S.A. section 8911(9), might permit discrimination in its operation, the exemption could be saved by, in effect, negating the possibility of unconstitutionality. This negation could happen in two ways: either (1) by presenting evidence at trial that the statute operated contrary to the Court's interpretation, i.e., by showing that the exemption does not in fact operate in a discriminatory manner, or (2) by promulgating an administrative regulation clarifying the scope of the exemption, i.e., by changing the face of the statute to eliminate the possible discriminatory interpretation. *Id.* at 35-36 (Blackmun, J., dissenting). Nothing in the majority opinion contradicts the dissenters' contentions that the statute could be so cured.

After the United States Supreme Court handed down the *Williams* decision, the Department of Motor Vehicles ("DMV") adopted an administrative rule explicating the 32 V.S.A. section 8911(9) exemption. Under the new rule, a Vermont resident purchasing a motor vehicle out of state is only entitled to a credit for taxes paid out of state if he or she "has not previously registered the vehicle in the state where it was acquired or in any other state." Agency of Transportation, Department of Motor Vehicles, Motor Vehicle Purchase and Use Tax, Rule 86-28-E, section 1(d) (July 5, 1986). The effect of the adoption of this regulation on the current litigation has never been evaluated by any court. At the time Vermont Supreme Court remanded the case to this court, the regulation had only been formulated but not accepted.

DMV's interpretation of the statute must be given great weight because the "construction of statutes by

those charged with their execution [ought to be followed by courts] unless there are compelling indications that the construction is wrong." *Town of Cambridge v. Bassett*, 142 Vt. 171, 177 (1982) (quoting *In re Agency of Administration*, 141 Vt. 68, 74-75 (1982)). As a general rule, as long as an administratively adopted rule does not compromise the intent of the legislation upon which it is based, it must be upheld. *Agency*, 141 Vt. at 74. In the specific case of the motor vehicle purchase and use tax, DMV regulations that are "reasonably designed to carry out the intent of this chapter, shall have the same force as if enacted [by the legislature]." 32 V.S.A. section 8901.

DMV's construction of section 8911(3) is consistent with the plain meaning of that statute, and it does not compromise the stated intent of the motor vehicle purchase and use tax, which is "to . . . improve and maintain the state and interstate highway systems," 32 V.S.A. section 8901.

Section 8911(9) grants tax credits on cars (1) "acquired outside the state by a resident of Vermont," (2) "on which a state sales or use tax has been paid," if (3) "the state . . . collecting such tax would grant the same pro-rata tax credit for Vermont tax paid under similar circumstances." To "acquire" means simply "to come into possession, control, or power of disposal of something, often by some uncertain or unspecified means." Webster's Third New International Dictionary 18 (unabridged ed. 1981). To acquire a car outside the state does not necessarily imply that one will register it out of state. No other term in this section suggests that the exemption refers to cars acquired and registered, rather than merely acquired, out of state. To the extent that the section leaves the question open and allows for cars registered out of state to be included in the exemption, the DMV regulation closes the loophole and clarifies the scope of the exemption.

Closing this loophole does not undercut the overall purpose of the purchase and use tax. To the contrary, the regulation merely insures that Vermonters who acquire and register cars out of state—who, in effect, benefit from the use of highways in two states—share in the tax burden of two states. This result is completely consistent with the statutory statement of purpose of section 8901.

Under 8911(9) as clarified by the DMV regulation, residents and nonresidents are treated identically. Neither will receive an exemption in the form of tax credit on vehicles registered out of state prior to their registration in Vermont. Because section 8911(9) now explicitly provides no special treatment for residents, it is facially constitutional and would survive the equal protection scrutiny used by the *Williams* court. Therefore, the plaintiffs no longer can request declaratory judgment or injunctive relief, not because these actions are barred by sovereign immunity, but because the equal protection issues concerning what section 8911(9) means and how the exemption must be applied are now moot. As a result of the DMV regulation, an actual justiciable controversy no longer exists. See *Robtoy v. City of St. Albans*, 132 Vt. 503, 504 (1974).

Changing the statute, while it eliminates actions for declaratory and injunctive relief, does not affect the plaintiffs' claim for monetary damages. If the plaintiffs in fact were taxed in a constitutionaly defective and discriminatory manner, the claim for a tax refund would survive.

Insofar as what remains of this suit is a tax refund action against the state and defendant Conway in his official capacity, however, the plaintiffs' recovery is barred by sovereign immunity. This issue was addressed and decided in *American Trucking Association v. Conway*, ("*ATA*"), 146 Vt. 579 (1986). In *ATA*, our state supreem court held that "In Vermont, the state cannot be

sued without its consent for injuries resulting from the exercise of functions essentially governmental in character." *Id.* at 587 (citing *Stoneman v. Vergennes Union High School District #5*, 139 Vt. 50, 53 (1980)). The *ATA* court specifically recognized that imposition of a tax was just such an essential government activity—one "which could be performed only by a governmental entity." *Id.* Thus, the plaintiffs would not be barred in an appropriate suit from challenging the constiutionality of a statute, such as the purchase and use statute, but they can be barred as a matter of state sovereign immunity from recovering any money as a result.

Moreover, many courts faced with the issue have held that state sovereign immunity can bar money damages against the state, state agencies, and state officials sued in their official capacity in section 1983 suits. *Kristensen v. Strinden*, 343 N.W.2d 67, 76 (N.D. 1983); *DeBleaker v. Montgomery County*, 438 A.2d 1348, 1356 n.4. (Md. 1982). *Also, see* especially the extensive discussion of this issue in *Kristensen* at 75-78. Given the validity of a sovereign immunity defense in a section 1983 action, plaintiffs' claim for tax refund is barred in the absence of specific legislative waiver of immunity. *ATA* at 587-88. The plaintiffs assert such a waiver can be found in 32 V.S.A. section 8914, which provides "Any overpayment of such tax as determined by the commissioner shall be refunded." The plain, unambiguous meaning of overpayment is "payment in excess of what is due" or "the amount paid in excess." Webster's Third New International Dictionary 1609 (unabridged ed. 1981). Thus, by its expilict terms, section 8914 permits the return of excess money paid in by a taxpayer whose taxes are incorrectly calculated and hence "overpaid." The section does not provide for the return of unconstitutionally paid taxes, which are in some sense wrongfully, but not excessively, charged.

Section 8914 on overpayment, while somewhat terse, is nonetheless very similar to the statutory provision interpreted by the Vermont Supreme Court in *ATA*. In that case, the court declined to find a waiver of sovereign immunity in 23 V.S.A. section 3020(b), which provides that

> If the commissioner determines that a tax . . . has been paid more than once . . . or has been illegally or erroneously collected or computed, the excess amount paid or collected shall be credited to the tax account of the licensee . . . Any balance of the excess amount remaining in the licensee's account after crediting the overpayment shall be refunded if requested. . . .

The *ATA* court's rationale for declining to find a waiver of sovereign immunity in 23 V.S.A. section 3020(b) also applies in the case before this court and bears repeating in this opinion.

> Here, the Vermont legislature has not inferentially indicated its intent to provide the amounts paid to the state under a statute later declared invalid. The legislature may be presumed to rely on the receipt of tax revenues received from valid properly administered enactments. The power to levy taxes and appropriate the resulting funds is a fundamental attribute of sovereignty. That power would be sorely compromised if private citizens were able to do what the executive branch may not do—spend state funds without legislative appropriation. *ATA*, 146 Vt. at 588.

Under the *ATA* rationale, the legislature is entitled to depend on funds raised from the taxes it levies. If another branch of government takes more than the legislature has authorized, that money must be returned to the taxpayer as an overpayment. But if the judiciary declares a money-raising statute unconstitutional, the legis-

lature remains entitled to the proceeds collected before its statute is declared unconstitutional. To find otherwise would be to improperly diminish the power of the legislature, which must be able to rely on the funds it raises, and which a court cannot order be returned, absent the legislature's explicit consent. Thus, the plaintiffs are barred by sovereign immunity from receiving a tax refund in this case.

In its May 6, 1987, order, this court made a number of overly general statements about the plaintiffs' ability to obtain relief. The statements seemed contradictory because they were not directed closely enough to the specifics of this case. Following the United States Supreme Court decision in *Williams*, this court was reluctant to terminate this litigation before a full airing of the facts. Such reluctance led us to read the plaintiffs' complaint too broadly. In effect, this court treated the plaintiffs' complaint as if it stated any and all possible claims against any and all possible defendants. We should have evaluated only those claims that the complaint fairly states.

A closer look at the issues in, and development of, this case has revealed that the plaintiffs cannot succeed on claims for declaratory, injunctive, or monetary relief under an equal protection theory directed against the state or William Conway in his official capacity. In addition, a second look at the plaintiffs' complaint fails to review a claim against William Conway in his individual capacity. Therefore, what, if any, relief could be obtained against him is not and never has been an issue before this court. Finally, equal protection is the only theory that currently remains in this suit. Both this court and the Vermont Supreme Court dismissed all other claims, and nothing in the United States Supreme Court's opinion has resurrected them.

ORDER

Based on the foreging, the defendants' motion for reconsideration is GRANTED. On reconsideration, the defendants' motion to dismiss is GRANTED; the plaintiffs' complaint is DISMISSED.

Dated at Montpelier, Vermont, May 3, 1988.

/s/ Alden T. Bryan
ALDEN T. BRYAN
Presiding Judge

/s/ Patricia B. Jensen
PATRICIA B. JENSEN
Assistant Judge

/s/ Paul H. Guare
PAUL H. GUARE
Assistant Judge

* * * *

RULE 4. PROCESS

* * * *

(d) Summons: Personal Service Within the State. The summons and complaint shall be served together. Personal service within the state shall be made as follows:

(1) Upon an individual by delivering a copy of the summons and of the complaint to the individual personally or by leaving copies thereof at the individual's dwelling house or usual place of abode with some person of suitable age and discretion then residing therein or by delivering a copy of the summons and of the complaint to an agent authorized by appointment or by law to receive service of process, provided that if the agent is one designated by statute to receive service, such further notice as the statute requires shall be given. The court, on motion, upon a showing that service as prescribed above cannot be made with due diligence, may order service to be made by leaving a copy of the summons and of the complaint at the defendant's dwelling house or usual place of abode, or to be made by publication pursuant to subdivision (g) of this rule, if the court deems publication to be more effective.

* * * *

(2) Upon the State of Vermont or any agency or officer thereof, by delivering a copy of the summons and of the complaint to the Attorney General or the Deputy Attorney General.

* * * *

RULE 12. DEFENSES AND OBJECTS—WHEN AND HOW PRESENTED—BY PLEADING OR MOTION—MOTION FOR JUDGMENT ON THE PLEADINGS

* * * *

(h) Waiver or Preservation of Certain Defenses.

(1) A defense of lack of jurisdiction over the person, improper venue, insufficiency of process, or insufficiency of service of process is waived (A) if omitted from a motion in the circumstances described in subdivision (g), or (B) if it is neither made by motion under this rule nor included in a responsive pleading or an amendment thereof permitted by Rule 15(a) to be made as a matter of course.

(2) A defense of failure to state a claim upon which relief can be granted, a defense of failure to join a party indispensable under Rule 19, and an objection of failure to state a legal defense to a claim may be made in any pleading permitted or ordered under Rule 7(a), or by motion for judgment on the pleadings, or at trial on the merits.

(3) Whenever it appears by suggestion of the parties or otherwise that the court lacks jurisdiction of the subject matter, the court shall dismiss the action.

VERMONT STATUTES
ANNOTATED

* * * *

TITLE THREE
Executive

* * * *

Chapter 25. Administrative Procedure

* * * *

§ 815. Judicial review of contested cases

(a) A person who has exhausted all administrative remedies available within the agency and who is aggrieved by a final decision in any contested case may appeal that decision to the supreme court, unless some other court is expressly provided by law. However, a preliminary, procedural, or intermediate agency action or ruling is immediately appealable under those rules if review of the final decision would not provide an adequate remedy, and the filing of the appeal does not itself stay enforcement of the agency decision. The agency may grant, or the reviewing court may order, a stay upon appropriate terms.

(b) If, before the date set for court hearing, application is made to the court for leave to present additional evidence, and it is shown to the satisfaction of the court that the additional evidence is material and that there were good reasons for failure to present it in the proceeding before the agency, the court may order that the additional evidence be taken before the agency upon conditions determined by the court. The agency may modify its findings and decisions by reason of the additional evidence and shall file that evidence and any modifications, new findings, or decisions with the reviewing court.—

* * * *

TITLE TWENTY-THREE

MOTOR VEHICLES

Chapter 1. General Provisions

* * * *

§ 4. Definitions

* * * *

(30) Resident shall include all legal residents of this state and in addition thereto, any person except a person who is domiciled in another state and who returns to the state on a regular basis of no less than weekly who accepts employment or engages in a trade, profession or occupation in this state for a period of at least six months. Also in addition thereto, any foreign partnership, firm, association or corporation having a place of business in this state shall be deemed to be a resident as to all vehicles owned or leased and which are garaged or maintained in this state;

* * * *

Chapter 3. Motor Vehicle Department

* * * *

§ 105. Hearing before commissioner

In the administration of the laws relating to motor vehicles and to the operators and the operation thereof, the commissioner may conduct hearings, subpoena witnesses, administer oaths and take testimony. He may also cause depositions to be taken and order the production of books, papers and records relating to the matter under investigation. The fees for travel and attendance of witnesses and fees for officers shall be the same as for witnesses and officers before a district court and shall be paid by the state upon presentation of proper bills of cost to the commissioner of finance and management. The fees of witnesses summoned or used by such peti-

tioner shall be paid by him. The commissioner may appoint a hearing officer to conduct hearings.

§ 106. Procedure upon hearings

The commissioner shall determine the rules and procedure under which such hearings shall be held. On request of the commissioner, the state's attorney of the county where such hearing is to be held shall attend and represent the state.

§ 107. Notice of hearings

Notice of a hearing held by the commissioner or the hearing officer under the provisions of sections 105 and 106 of this title, shall state the place, day and hour thereof, and warn the petitioner that he may then appear through himself or counsel. Service of such notice shall be sufficient if sent by registered mail to the address given by the petitioner at least five days before the day set for the hearing, provided a return receipt has been received.

* * * *

Chapter 7. Registration

SUBCHAPTER 1. GENERAL REGISTRATION

ARTICLE 1. GENERAL PROVISIONS

§ 301. Persons required to register

Residents as defined in section 4 of the title, except as provided in section 301a and chapter 35 of this title, shall annually register motor vehicles owned or leased for a period of more than thirty days and operated by them, unless currently registered in Vermont. A person shall not operate a motor vehicle nor draw a trailer or semitrailer on any highway unless such vehicle is registered as provided in this chapter.

* * * *

TITLE THIRTY-TWO

TAXATION AND FINANCE

* * * *

Chapter 219. Motor Vehicle Purchase and Use Tax

* * * *

§ 8903. Tax imposed

(a) There is hereby imposed upon the purchase in Vermont of a motor vehicle by a resident a tax at the time of such purchase, payable as hereinafter provided. The amount of the tax shall be four percent of the taxable cost of the motor vehicle or $500.00 for each motor vehicle, whichever is smaller.

(b) There is hereby imposed upon the use within this state a tax of four percent of the taxable cost of a motor vehicle, or $500.00 for each motor vehicle, whichever is smaller, by a person at the time of first registering or transferring a registration to such motor vehicle payable as hereinafter provided, except no use tax shall be payable hereunder if the tax imposed by subsection (a) above has been paid.

(c) The Vermont registration or transfer of Vermont registration of a motor vehicle shall be conclusive evidence that the purchase and use tax applies except as provided in section 8911 of this title.—

* * * *

§ 8914. Refund

Any overpayment of such tax as determined by the commissioner shall be refunded.

DEPOSITION OF CLINTON KRAUSS

* * * *

July 9, 1986

* * * *

Could you start off for us, please, by telling us what the position is you presently hold with the Department of Motor Vehicles?

A Presently I'm a Supervisor of the Information Section.

Q And as the Supervisor of the Information Section, what do you do?

A Our section is responsible for asking—answering telephone queries regarding a broad range of registration and licensing subjects, for handling a half dozen different types of paperwork.

* * * *

Q You say along the lines of this right along. You're talking about 23 VSA 301; is that correct?

A Where Vermont residents are required to register in the State of Vermont. And I had been administering it along those lines regularly. This particular gentleman disagreed with me vociferously—that's the politest way of putting it—and was so rude and insistent that I went to the Commissioner—I was so certain of my interpretation of it that I went to the Commissioner and asked him to deal with this gentleman. In the course of so doing, he pointed this out and strengthened, if you will, my understanding of how I was supposed to be administering to Vermont residents who had or a person who was claiming to be a Vermont resident who had registered the vehicle elsewhere. According to the Commissioner and this section here and my prior understanding, he didn't possess that privilege.

Q Do I correctly understand that the reason he did not possess the privilege of claiming the exemption was because that Vermont resident had actually registered the car out of state?

A Registered and presumably used, yes.

Q Was the key criteria the registration of the car outside Vermont?

A It was certainly key. It was important.

* * * *

Q The particular one I think you're looking for is dated. It's dated May of 1985.

A May of '85. Yes. That is the—this placement [regulation] reflects almost precisely what was explained to me by the Commissioner in the course of handling the gentleman from Case two.

Q . . . Do I understand that up until the time that particular written policy, which you've now referring to, was implemented, that the inspectors were occasionally making what you perceived to be those mistakes in applying the—in giving exemptions to people they shouldn't?

A Yes, occasionally.

Q How often would you say over the period of time, say, since you've been in your position, has that occurred?

A Let's see. Six, seven that I know of.

* * * *

Q . . . . And I believe you were asked a question by Mr. O'Neill with respect to whether those individuals, in your opinion, were—should have been denied the credit.

A He said because they were really out of staters at the time, if I recall.

Q What was your understanding of that question?

A Of that exchange?

Q Yes.

A That these two were really not Vermont residents anyway, and that was the reason why, and the reason why really is because they registered there and used it there rather than the fact that they were or were not residents. The main one was they registered their vehicle there, and a Vermont resident doesn't have that privilege, so it just didn't apply to people who were out of staters; it applied also to any Vermonter, legitimate Vermonter who might have done the same thing. If this man had

been my next door neighbor, I would have taxed him. He doesn't possess the privilege of driving to New Jersey and buying license plates. I would have had to tax him. So whether he was [former Governor] Deane Davis or not, I would have taxed anyone in these circumstances, resident or non-resident.

MR. O'NEILL: Excuse me. Just for the record, if I may, when you say these circumstances, you're pointing to the two instances on the memo which is Exhibit 18; is that right?

DEPONENT: Yeah. And by circumstance I mean person who had registered a vehicle out of state for a—a person, resident or non-resident, who had registered a vehicle out of state for a significant period of time and used it there and then brought it back. So whether that person was a resident or a non-resident, I taxed them. The circumstances were the same.

* * * *

Q For example, George Aiken [former U.S. Senator], and that individual were to purchase a car in another state and first register that vehicle in that other state and were then to return to Vermont, would be your practice?

A Taxed him. He did not possess that privilege.

* * * *

EXAMINATION BY MR. O'NEILL:

Q You testified . . . that after September 1, 1980 when the non-resident exemption has been repealed but before the conversation you had with Commissioner Conway, you were denying the credit to people who had registered their car outside of the State of Vermont who claimed to be Vermont residents and then sought to register it in Vermont; is that right?

A Yes.

* * * *

Q In the instances where you had some disagreement with the conclusions that had been reached by the in-

spectors, roughly a half dozen occasions, did you speak with the inspectors about your disagreement with them, or did you try to get the policy clarified in some way so that there would be uniform policy?

A Both ways. Both ways.

Q What did you do?

A Well, some of these memos are, as I said, attempts to get clarification up from my position on this leg up and then hopefully down, and I have some reason to believe, perhaps, you know, that the substance of that policy may have been in part due to my efforts. I don't know.

Q You say the May of 1985 policy?

A Yes. That certainly reflects my understanding of how it was to be done right along, and I was pleased to see it.

* * * *

Q In other words, residency had nothing to do with that question? It was purely a question of where the vehicle was being registered?

A Yes.

I have carefully read the foregoing deposition and the answers made by me are true.

/s/ Clinton Krauss
CLINTON KRAUSS

STATE OF VERMONT

COUNTY OF WASHINGTON

At Montpelier in said County this 31st day of July, 1986, personally appeared the above-named Clinton Krauss and made oath that the foregoing answers, subscribed by him, are true.

Before me,

/s/ [Illegible]
Notary Public

My commission expires 2/10/87.

DEPOSITION OF THOMAS McCORMICK

* * * *

November 25, 1988

* * * *

Q And Mr. McCormick, could you tell up please how you are employed?

A I am director of law administration for the Department of Motor Vehicles.

Q How long have you held that position?

A Since about the third week in September of 1981.

* * * *

Q Let me rephrase the question to you. Isn't it a perfectly reasonable interpretation of that statute that the statute is intended to permit—irrespective of whether they register the car permanently outside Vermont or not—a person to go ahead and purchase—a Vermont resident to purchase an automobile outside of Vermont and not have to come back to Vermont and pay the tax again?

MR. ESCHEN: Objection.

A No, I don't think so.

* * * *

CERTIFICATE

I, Ann M. Whiting, Court Reporter and Notary Public, do hereby certify that the foregoing pages, numbered 4 through 78, inclusive, are a true and accurate transcription of my stenographic notes of the deposition of THOMAS McCORMICK, taken before me on Tuesday, November 25, 1986, at 10:52 a.m., for use in the matter of NORMAN WILLIAMS and SUSAN LEVINE VS STATE OF VERMONT AND WILLIAM H. CONWAY, JR., COMMISSIONER OF MOTOR VEHICLES. VALERIE M. QUINN, ET AL VS STATE OF VERMONT, ET AL.

/s/ _____

ANN M. WHITING

DEPOSITION OF HAROLD R. CONE

* * * *

November 20, 1986

* * * *

A . . . '75 approximately I moved into Montpelier as what was called a supervising inspector. . . . two, three years later it was changed to chief inspector, the title, not the job but the title. And I was chief inspector until the 1st of September, 1984 when I retired.

* * * *

Q Mr. Cone, to your personal knowledge how many times was a tax credit given to someone who had first registered their car out of state, again, in the example of a Vermonter who had first registered their car out of state?

A By me?

Q Yes.

A I can't even tell you for sure that I gave it in more than one instance. You know, I can't remember back that far.

Q And with respect to the people who were beneath you who were in your division, do you know how many times they granted a credit to a Vermonter who had first registered outside the state?

A No, I have no way of knowing.

* * * *

CERTIFICATE

I, Angela M. LeClerc, Court Reporter and Notary Public, hereby certify that the foregoing pages 4-43 inclusive comprise a full, true and correct transcript taken from my stenographic notes in the deposition taken of HAROLD R. CONE, taken before me as Notary Public on Thursday, November 20, 1986, at the Tavern Motor Inn, Montpelier, Vermont, and transcribed by me for use in the case of *Norman Williams and Susan Levine vs. State of Vermont and William H. Conway, Jr., Commissioner of Motor Vehicles*, Docket No. 436-82 WnC, now pending before the Washington Superior Court.

/s/ Angela M. Leclerc
ANGELA M. LECLERC

My commission expires February 10, 1987.

DEPOSITION OF DEAN MARTIN

* * * *

July 30, 1986

* * * *

Q. Mr. Martin, how are you employed, sir?
A. With the Vermont Department of Motor Vehicles.

* * * *

Q. Do you feel qualified to give an answer on behalf of the entire Department of Motor Vehicles with respect to how the tax credit was administered before or after June of '85?
MR. O'NEILL: Objection.
A. No.

* * * *

I have carefully read the foregoing deposition and the answers made by me are true.

/s/ Dean Martin
DEAN MARTIN

STATE OF VERMONT
COUNTY OF WASHINGTON

At Montpelier in said county this 25th day of August, 1986, personally appeared the above-named DEAN MARTIN, and made oath that the foregoing answers, subscribed by him are true.

Before me,

/s/ Bonnie L. Rutledge
Notary Public

DEPOSITION OF LOUIS THERIAULT

* * * *

November 20, 1986

* * * *

Q And, Mr. Theriault, how are you employed, sir?

A I'm an inspector for the Vermont Department of Motor Vehicles.

* * * *

Q Let me see if I understand what's going on here. In all cases would that person receive the tax credit? Let me rephrase the question. In 1981 or 1982 would a person who holds himself out as a Vermont resident automatically be entitled to a tax credit from you?

MR. O'NEILL: Objection.

A No one—I've never exempted anyone automatically from paying a tax based solely on the claim that he was a Vermont resident.

Q What would you look to in determining whether an individual would be entitled to the tax credit?

A First of all, the type of vehicle concerned, whether or not we had reciprocity with whatever particular state we're talking about. I would try and determine that he in fact was a Vermont resident through the question of unemployment and so on, and if he had proof that he paid the tax, I would say he would be tax exempt.

Q And if the person had permanently registered the vehicle in another state before he came back to Vermont, was that a consideration that you would look into?

A It's a consideration.

* * * *

CERTIFICATE

I, Angela M. Leclerc, Court Reporter and Notary Public, hereby certify that the foregoing pages 4-21 inclusive comprise a full, true and correct transcript taken from my stenographic notes in the deposition taken of LOUIS THERIAULT, taken before me as Notary Public on Thursday, November 20, 1986, at the Tavern Motor Inn, Montpelier, Vermont, and transcribed by me for use in the case of *Norman Williams and Susan Levine vs. State of Vermont and William H. Conway, Jr., Commissioner of Motor Vehicles*, Docket No. 436-82 WnC, now pending before the Washington Superior Court.

/s/ Angela M. Leclerc
ANGELA M. LECLERC

My commission expires February 10, 1987.